Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)))	CG Docket No. 04-208

To: The Commission

COMMENTS

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June 24 , 2005

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SUMMARY

Preemption. The FCC has adopted a broad national framework for ensuring clear and non-misleading billing that carefully balances consumer interests, the pro-competitive deregulatory approach demanded by Congress, and providers' First Amendment rights. It has now proposed preemption of state regulation of CMRS billing. Cingular supports the proposal to preempt. There is a need for national uniformity: There is *no* valid reason to have fifty or more sets of regulators establishing billing rules for a national service that is already subject to the FCC's Truth-in-Billing rules. Even if each state adopts reasonable rules or interpretations that are individually consistent with the FCC's rules, there will still be fifty or more different and potentially conflicting regulations and interpretations governing the very same bills.

The burden of complying with fifty or more state, district, and territorial billing laws would be enormous. Cingular serves more than fifty million customers nationwide. It currently uses four billing systems, each of which would need to have variants for fifty or more jurisdictions. This could ultimately cost billions of dollars, given the millions of lines of code involved, the hundreds of thousands of rate plans, and the need to change point of sale, customer service, web interface, and other systems. The alternative of complying with *all* states' requirements in a single billing format is not a realistic option, because it will produce a result that is neither brief nor clear and may even be misleading — and thus would not satisfy the Commission's own rules. Consumers would not benefit from such regulation; they would ultimately have to bear the cost and encounter delays in the availability of new services because of the complexity of billing for such services in accordance with multiple states' rules.

Preemption is legally justified under these circumstances. The Commission has broad authority over CMRS billing pursuant to Sections 201, 202, 205, and 332. Wireless services have evolved to a national, interstate service, with nationwide platforms and national rate plans that do not recognize any distinction between local and long-distance service, and carriers employ networks and billing, sales, and marketing systems that function on an interstate basis. Moreover, the FCC's authority extends to billing for intrastate services that cannot readily be separated from the interstate service on which the Commission's jurisdiction is based. The billing for wireless service is an integrated part of the wireless service offering and is subject to the Commission's Title II jurisdiction. Because the Commission has plenary authority over interstate service, it clearly may exercise its jurisdiction to assert federal primacy over the billing for wireless service because it is provided without distinction across state boundaries.

The Commission's broad national framework for regulation of CMRS billing will be compromised by allowing fifty states to regulate the same providers and the same bills. The Commission has long sought to further competitive delivery of wireless service through uniform federal regulatory policies and limited market-oriented regulation. The fact that the Commission relies largely on market forces does not justify states stepping in; the courts have affirmed the preemptive use of market forces as a regulatory tool.

Nothing in the Communications Act stands in the way of Commission preemption of state regulation of CMRS billing. Section 332 is no obstacle; it merely exempts certain state regulation of intrastate services from that section's preemption of rate and entry regulation; CMRS billing does not pertain to an exclusively intrastate service, and state regulation must yield to federal regulation of billing for services that cannot be separated between the two jurisdictions. Likewise, Section 2(b) of the Act does not restrict the Commission's ability to preempt state regulation of service that is not purely intrastate and, in any event does not preclude FCC

regulation of intrastate wireless services. And the "savings clause," Section 414, does not prevent the Commission from validly exercising its authority to establish federal rules and policies, which may in turn preempt state law.

The Commerce Clause provides considerable additional support for preemption. State regulation of what has become an interstate, national market constitutes both the unlawful regulation of interstate commerce and an unwarranted burden on interstate commerce. State regulation of CMRS billing will lead to unacceptable balkanization of this national market and is as burdensome on interstate commerce as the state regulation of VoIP that the Commission preempted in its *Vonage Holdings* decision. CMRS customers, like VoIP users, are not limited to a fixed location in a single state. Their phone numbers, billing addresses, and principal places of use may be tied to entirely different states. As a result, any state that regulates CMRS billing may affect providers regardless of where bills are addressed or where service is rendered. CMRS providers would need to comply with all fifty states' billing laws. Inconsistent state regulation of billing – much of it affecting service provided entirely outside a given state's boundaries – could cripple CMRS development. States are considering legislation or rules that would purport to govern wireless carriers' bills. Many of these would impose onerous obligations on carriers that could conflict with other state or federal statutes or rules. They would also broadly affect the way in which wireless carriers provide service.

The Commission has also asked for further comment on the scope of Section 332's preemption. While states may properly adopt and enforce consumer protection through laws of general applicability, such laws should be preempted when they are applied to achieve back-door regulation of otherwise preempted activity, specifically CMRS rates and entry. Certain state laws affecting CMRS providers' practices have been, and likely will continue to be, employed in lawsuits seeking to regulate CMRS providers' rates, rate structures and market entry. The Commission should clarify that it interprets Section 332's preemption of state CMRS rate and market entry regulation as extending to all such lawsuit-driven regulation of CMRS rates and market entry. Although the Commission has emphasized that it is the substance, not merely the form of the state claim or remedy that determines whether it is preempted under Section 332, some courts have had difficulty performing the required analysis when confronted with rate challenges masquerading as state consumer protection claims.

Other Issues. Cingular supports several of the proposals contained in the *Second Further Notice*. A number of these proposals relate to issues that are addressed in the Assurances of Voluntary Compliance that have been signed by Cingular, Verizon Wireless, Sprint PCS and Attorneys General of 33 states who are responsible for enforcing state consumer protection laws. The vast majority of wireless subscribers are already enjoying the benefits of the commitments made in the AVCs. Cingular respectfully submits that, to the extent the *Second Further Notice* raises issues that already are addressed in the AVCs and additional rules are necessary, the Commission should adopt rules for wireless carriers that are consistent with the AVCs. Specifically, the FCC should adopt a nationally-applicable definition of mandated charges for wireless carriers that distinguishes between amounts carriers are required to collect from consumers and-those which they choose to collect. To the extent the FCC adopts the more inclusive definition of mandated charges that is consistent with the CTIA Consumer Code, it should adopt the AVCs as a safe harbor, and confirm that carriers who abide by the AVCs in this regard will be deemed in compliance with the FCC's rules. In adopting a definition for mandated charges, the FCC should not inadvertently limit wireless carriers' ability to recover the costs of compliance with various regulatory programs. As required by the AVCs, the FCC should require wireless carriers to place mandated charges in a separate section of consumer bills. And, the Commission should not adopt additional categories of charges beyond "mandated": additional categories would increase rather than decrease consumer confusion.

To the extent the Commission finds disclosure rules are necessary, the Commission should adopt provisions consistent with the AVCs. The AVCs require that wireless carriers provide consumers with complete rate information, including an estimate of mandated and discretionary charges associated with service at the point of sale. Finally, the Commission should conclude that a wireless carrier's provision of a reasonable range of potential surcharges is not misleading, provided that the consumer is apprised of the highest potential amount of those charges.

The FCC should confirm that line items called "Regulatory Assessment Fees" or "Cost Recovery Charges" are consistent with the requirements of Section 64.2401(b) of the rules. The Commission should conclude that the recovery of the costs of multiple regulatory programs by wireless carriers in a single line item is reasonable under Section 201(b) of the Act, provided that the carrier does not state or imply that the charge is mandated and does not include a misleading description of the charge in its bills. Finally, the Commission should conclude that the Telephone Relay Service (TRS) line-item prohibition does not apply to CMRS providers.

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COMMENTS

Cingular Wireless LLC ("Cingular") hereby submits these comments on the *Second Further Notice of Proposed Rulemaking* released in the above-captioned proceeding on March 18, 2005 (the "*Second Further Notice*").[1] Cingular is one of the largest providers of Commercial Mobile Radio Service ("CMRS"). The company serves over fifty million customers nationwide. Thus, Cingular has a substantial interest in providing consumers throughout the country with consistent and accurate billing information.

The FCC already has adopted a broad standard for regulating billing which strikes an appropriate balance among consumer interests, the procompetitive deregulatory goals of the Communications Act of 1934, as amended (the "Communications Act" or "Act"), and carriers' First Amendment rights. State regulation of billing undercuts the carefully balanced federal scheme and interferes with interstate commerce. Put simply, it is impermissible and makes no sense for

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[1] *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* CC Docket 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55 (Mar. 18, 2005) (referred to herein as "*Second R&O*," "*Declaratory Ruling*," and "*Second Further Notice*," respectively).

states to adopt regulations that could subject carriers to fifty or more different billing constructs, requiring multiple billing systems and imposing enormous unnecessary costs.

State regulation of CMRS billing adversely affects not only the present-day nationwide carriers, but would-be providers, too. It also will hurt the interests of consumers, who will ultimately have to shoulder the cost of their providers' complying with fifty or more schemes for how to regulate CMRS billing.

The Commission itself has taken notice of the growing state efforts to adopt their own state-specific regimes. Presumably, each of these regulatory bodies has the same goal — providing consumers with clear, accurate and non-misleading information. Such a goal warrants a national solution. In light of the foregoing, the Commission must act now to modify its rules to preempt state regulation of bills and billing practices.

Cingular supports the goal underlying the Truth-in-Billing ("TIB") rules — to provide consumers with clear, accurate and non-misleading information — and many of the other proposals in the *Second Further Notice* aimed at serving that goal. Cingular has taken an active role in implementing the letter and spirit of the Commission's TIB rules in its own advertising, sales and billing practices. Cingular has entered into an Assurance of Voluntary Compliance with Attorneys General of 33 states (the "Cingular AVC") with respect to its marketing, sales, and billing practices. [2] The AVC sets forth disclosure requirements for Cingular to follow in connection with the billing for and advertising and sale of, the wireless services and features that it provides. The commitments in the AVC represent those actions that the 33 Attorney General signatories to

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[2] A copy of the Cingular AVC is attached hereto as Attachment 1. It has been signed by the states of Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming.

the document believed were consistent with the various consumer protection, deceptive trade practices, consumer fraud, and similar statutes and regulations over which they have prosecutorial authority.

Cingular also is a signatory to the CTIA Consumer Code for Wireless Service ("CTIA Consumer Code"), a wireless industry effort to address issues of greatest concern to consumers, including how rates and terms of service are disclosed.[3] Cingular announced that it was in compliance with the CTIA Consumer Code on September 9, 2003 — the same day that CTIA unveiled it, and was the first carrier to be awarded the right to use the CTIA Seal of Wireless Quality. In fact, Cingular exceeds the requirements of the CTIA Consumer Code.

Among other things, the CTIA Consumer Code governs carrier disclosure of mandated and discretionary charges in advertising materials and consumer bills. Cingular meets or exceeds all ten points of the CTIA Consumer Code. For example, Cingular has created a "Cingular Service Summary," which provides consumers with a *personalized* estimate (based on the service plan they choose) of *all* charges associated with that service that will appear on the consumer's initial bill *and* subsequent bill. Consumers receive the Cingular Service Summary whether they sign up for service in a Cingular or agent's store, over the phone, or on the Cingular website. Cingular also has adopted a 30-day return policy, which enables customers to cancel their service for any reason within the first 30 days of service without penalty — the longest of any nationwide wireless carrier.

[3] A description and a copy of the CTIA Consumer Code may be found at http://www.wow-com/wireless_consumers/consumer_code.

DISCUSSION

I. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF CMRS BILLING

A. Introduction

The Commission has sought comment on whether it "should reverse [its] prior pronouncement that states may enact and enforce more specific truth-in-billing rules"[4] and asks whether it "should preempt under the Act state regulation of CMRS carriers' billing practices" beyond the preemption of "line item" regulations recognized in the *Declaratory Ruling*.[5] As part of this inquiry, the Commission seeks comment on the legal bases supporting such preemption and asks commenters "to delineate what they believe should be the relative roles of the Commission and the states in defining carriers' proper billing practices."[6] In this regard, the Commission tentatively concludes that "the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices."[7]

Cingular supports the Commission's tentative conclusion that it should reverse its previous determination that states may enforce billing rules against CMRS carriers. Since their inception, wireless telecommunications services have evolved from local services to national, interstate services involving clearly discernible federal policies and objectives. Today, there are nationwide wireless services and national rate plans that do not recognize any distinction between local and long-distance service and that include coverage extended beyond the serving carrier's

4 *Second Further Notice* at ¶ 51.
5 *Id.* at ¶ 50.
6 *Id.* at ¶¶ 50, 52.
7 *Id.* at ¶ 53.

own network, and which consequently employ complex and interrelated billing techniques,[8] allowing the service to be used almost anywhere in the nation. Continued state regulation of CMRS billing makes no sense under these circumstances.

1. Sources of Authority for Preemption

a. Constitutional provisions

The Commission unquestionably has the necessary legal authority to regulate CMRS billing to the exclusion of state regulation. Pursuant to the Commerce Clause of the Constitution, [9] "[i]t is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be."[10] Ultimately, however, the federal preemption of state law is rooted in the Supremacy Clause,[11] which invalidates state laws that "interfere with, or are contrary to, the laws of Congress . . . ." *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824).

In addition to "express" preemption, which flows from an explicit statutory provision barring state action, the Supreme Court has identified several types of "implied" preemption:

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990), . . . where it is "impossible for a private party to comply with both state and federal requirements," *id.* at 79, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[12]

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8 For example, Cingular's "rollover" program.

9 U.S. CONST., art. I, § 8 (Congress has authority to "make all Laws which shall be necessary and proper" to "regulate Commerce among the several States.")

10 *Gonzales v. Raich*, No. 03-1454 slip op. at 26 (U.S., June 6, 2005) (citations omitted).

11 U.S. CONST., art. VI § 2.

12 *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995).

And, of course, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are not otherwise inconsistent with federal law."[13]

b. Statutory authority

Congress has granted extensive authority to the FCC to regulate telecommunications, including CMRS. The Communications Act itself was enacted for the purpose of "mak[ing] available, so far as possible, to all of the people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service."[14] To that end, Congress granted the Commission exclusive and plenary jurisdiction over interstate telecommunications in Section 2(a) and Title II of the Act.[15] Congress also granted the Commission specific authority over CMRS providers in Section 332.[16] In addition, the Commission has "ancillary jurisdiction" to adopt rules where:

> (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[17]

Congress initially reserved to the states authority over all intrastate services in Section 2(b).[18] In many instances, however, a given service or facility may have both interstate and intrastate characteristics, resulting in mixed or concurrent jurisdiction.

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[13] *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

[14] 47 U.S.C. § 151.

[15] *See* 47 U.S.C. §§ 152(a), 201 *et seq.*

[16] *See* 47 U.S.C. § 332.

[17] *American Library Association v. FCC*, 401 F.3d 689, 691 (D.C. Cir. 2005). The Court held, however, that "the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire or radio." *Id.* at 702.

[18] *See* 47 U.S.C. § 152(b).

The 1996 amendments to the Act clarified the Commission's regulatory authority over intrastate services to the extent that regulation of such services would stand in the way of federal objectives. As the Supreme Court put it, Commission jurisdiction "always follows where the Act applies."[19] Moreover, the Court observed that after 1996, Section 2(b) of the Act, which excluded intrastate wireline communications from the Commission's jurisdiction, "may have less practical effect[,] . . . because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."[20]

The FCC's authority to regulate *wireless* services is even more extensive. Because "[n]o state lines divide the radio waves," the federal government concluded early on that "national regulation is not only appropriate but essential to the efficient use of radio facilities."[21] The Communications Act therefore asserted comprehensive federal control over the licensing and technical development of all radio systems.[22] That assertion of federal control has characterized and guided the federal regulation of CMRS since the first commercial use of that technology. Thus, in the late 1970s, the FCC exercised "federal primacy over the areas of technical standards and competitive market structure for cellular service," noting that "state and local regulations might conflict with and thereby frustrate" the federal goal of nationwide compatibility for

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19 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999).

20 *Id.*, 525 U.S. at 381, n.8.

21 *See Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933).

22 47 U.S.C. § 301 ("the purpose of this Act, among other things, [is] to maintain the control of the United States over all the channels of radio transmission").

CMRS.[23] The FCC has made clear that there is no room for state "improvement" upon these standards.[24]

In 1993, Congress amended the Communications Act to add section 332(c)(3)(A), which provides that "no state or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service."[25] The 1993 amendments also amended Section 2(b) of the Act to *exclude* wireless phone services from the general prohibition on FCC regulation of intrastate telecommunications services, thereby exempting wireless services from the system of dual state and federal regulation that governs wireline services.[26] The 1993 amendments thus continued the federal government's commitment to the maintenance of a uniform regulatory framework to promote rapid deployment of wireless telecommunications services: "[O]ur preemption rules [will] help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate of regulatory parity."[27]

The Commission's authority over interstate wireline services and all wireless services extends to billing matters.[28] Section 201(b) directs the Commission to ensure that all carrier charges, practices, and classifications are not unreasonable and to adopt rules where necessary

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[23] *Cellular Communications Systems*, CC Docket 79-318, *Report and Order*, 86 F.C.C.2d 469, 503-05 (1981) (*Cellular Order*). *See also id.* at 503 (holding that federal government has "fully and exclusively occupied the field of radio licensing and regulation").

[24] *Cellular Order*, 86 F.C.C.2d at 504-05 (preempting any additional requirement imposed by states that could conflict with FCC standards and frustrate the federal scheme for the provision of nationwide cellular service.).

[25] 47 U.S.C. § 332(c)(3)(A).

[26] *See* 47 U.S.C. § 152(b).

[27] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1421 ¶ 23 (1994).

[28] *TIB Order*, 14 F.C.C.R. 7503, ¶ 20; *Second R&O* at ¶ 25.

"for and in connection with" interstate communications service.[29] This authority is further reflected in Section 205 of the Act, which provides that "the Commission is authorized and empowered to determine and prescribe what will be a just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable . . . ."[30] The Commission found additional authority for its billing regulation in Section 258, which authorizes the Commission to adopt verification requirements to deter slamming in *both* the interstate and the intrastate markets, as well as Section 332, which provides the Commission with jurisdiction to enact rules concerning CMRS carriers.[31]

To the extent Title II gives the Commission authority over billing, under the *Iowa Utilities Board* decision the Commission's jurisdiction extends to billing over intrastate as well as interstate services where the billing for those services cannot be readily distinguished and separated. When it is not possible to separate a given service into interstate and intrastate components that can be regulated separately at the federal and state levels, the FCC's exercise of its authority over the interstate aspects of the service may even extend to the intrastate aspects of the service as well, preempting state law on the ground of inseparability.[32] Simply put:

> Commission preemption of state regulation is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects. . .; (2) Commission preemption is necessary to protect a valid federal regulatory objective . . . ; and (3) state regulation would 'negate the exercise by the Commission of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects.[33]

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29 47 U.S.C. § 201(b).

30 *Id.* at § 205(a).

31 *Id.* at §§ 258, 332; *see also TIB Order*, 14 F.C.C.R. at 7503 ¶ 21 n.35.

32 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

33 *Maryland PSC,* 909 F.2d 1510 (D.C. Cir. 1990), quoted in *Vonage Holdings Corp.*, 19 F.C.C.R. at 22415 ¶ 19 (footnotes omitted).

Accordingly, the Commission has held that, absent "a practical way to separate the service" into exclusively intrastate and interstate components, the state's regulation of a jurisdictionally mixed service that is already subject to Commission regulation "produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services," requiring preemption.[34]

2. The FCC's Exercise of Its Authority over Billing

Based on this clear statutory authority to address billing, the Commission in 1999 adopted "broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices."[35] These principles require that consumer telephone bills: 1) be clearly organized, clearly identify the service provider, and highlight any new providers; 2) contain full and non-misleading descriptions of charges that appear therein; and 3) contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or to contest charges on the bill.[36] The Commission applied the principles to all carriers, including wireless carriers, and intended "for these obligations to be enforceable to the same degree as other rules."[37] However, the Commission intentionally left the precise details regarding compliance with these obligations to CMRS carriers themselves to satisfy in a manner that best fit their own specific needs and those of their customers. In the Commission's view, this regulatory structure constitutes the appropriate balance of the "bedrock consumer protection obligations of common carriers" codified by Sections 201

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[34] *Vonage Holdings Corp.*, 19 F.C.C.R. at 22417 ¶ 22.

[35] *TIB Order*, 14 F.C.C.R. at 7498 ¶ 9.

[36] *Id.* at 7496 ¶ 5.

[37] *Id.* at 7499 ¶ 9, 7501 ¶ 13; *see also* 47 C.F.R. §§ 64.2400 and 64.2401.

and 202 of the Act,[38] the pro-competitive and deregulatory objectives of the Act, and carriers' First Amendment rights.

In its 1999 rules, the Commission declined to preempt state regulation of billing, provided the state regulations were consistent with the federal requirements.[39] Since that time, however, numerous states have adopted or are considering regulations concerning telecommunications carriers' bills, including specifically those of wireless carriers. Given the provision and support of wireless service on a national basis, these many forms of state regulation are increasingly in tension with the Commission's regulatory policies. In the *Second R&O,* the Commission found it necessary to preempt state regulation of CMRS carriers' use of separate line items on bills for recovering certain costs when the line items are not misleading and are consistent with Commission requirements.

The FCC also issued its accompanying *Second Further Notice,* in which it proposed reversing its prior policy and preempting state regulation of billing. The Commission has more than sufficient authority to preempt state regulation of the same bills that are governed by the Commission's own rules.

The Commission can and should be the sole repository of CMRS billing regulation — otherwise its carefully balanced regulatory scheme will be frustrated. Indeed, given the state of the industry today, to permit state regulation of CMRS billing in any form will lead to unacceptable balkanization of a national market, thus diminishing the extraordinary consumer benefits federal CMRS policies have yielded to date. State regulation of CMRS bills would negate im-

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38 *TIB Order*, 14 F.C.C.R. at 7502, ¶ 19, n.32, quoting *PCIA Petition for Forbearance For Broadband PCS,* 13 F.C.C.R. 16857, 16865 ¶ 15 (1998) ("*Wireless Forbearance Order*").

39 *See* 47 C.F.R. § 64.2400(c).

portant federal policies such as the promotion of advanced broadband services,[40] nationwide competition, and billing clarity. It would also constitute an excessive encumbrance on interstate commerce. The Commission therefore should reverse its prior decision that states may continue to regulate CMRS billing, and should modify Section 64.2400(c) of its rules to reflect that states are preempted from regulating CMRS billing. States also should be preempted from applying or interpreting the Commission's broad standards.

B. State Regulation of CMRS Billing Would Be Burdensome and Costly

As discussed below in Section I.D.2, states have adopted or proposed a wide variety of billing requirements for CMRS providers. These and other billing regulations that vary state by state would impose major burdens on CMRS providers, including enormous costs that will ultimately have to be borne by customers nationwide. Indeed, the Commission itself acknowledges that state-by-state regulation of billing "mak[es] nationwide service more expensive for carriers to provide and rais[es] the cost of service to consumers," and therefore solicited comment on the extent to which "requiring wireless carriers to satisfy 50 different states' sets of rules relating to consumer disclosures and the details on bills would stifle the further development of wireless competition and unreasonably burden interstate commerce."[41]

Cingular's experience serves as an example of the overwhelming burdens that would be associated with requiring CMRS carriers to comply with state billing requirements. Cingular serves more than fifty million customers nationwide, the District of Columbia, and several U.S. territories. Currently, Cingular operates four billing systems. Two billing systems service Cingular's former AT&T Wireless customers: one for TDMA and analog customers and one for

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40 *See* Promoting Innovation and Competitiveness: President Bush's Technology Agenda, Promoting Innovation and Economic Security through Broadband Technology, http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html.

41 *Second Further Notice* at ¶¶ 50, 52.

GSM customers. Another billing system is used for customers served by the former BellSouth Cellular networks, while yet another billing system inherited from SBC's wireless operations services the remaining customers. Among the four systems, Cingular maintains the ability to bill in accordance with some *250,000 different active rate plans*.[42]

These billing systems involve outside vendors as well as Cingular's extensive iInformation technology staff. There are millions of lines of code involved. Three of these billing systems are upgraded three times per year; the AT&T Wireless TDMA/analog billing system is not on a regular upgrade schedule. Because of the complexity of the billing systems and the effects of billing changes on other systems (*e.g.,* point of sale systems, customer care systems, promotional materials), in the best of times changes take eight to nine months, but when numerous major changes are made (*e.g.,* in connection with the integration of AT&T Wireless and Cingular) a longer time frame is needed.

Even if only one state's regulations applied to any single bill, it would be virtually impossible for Cingular to develop separate billing system variants to address each jurisdiction's regulations[43] and also fully comply with federal standards. All four of Cingular's billing systems

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[42] This seemingly huge number of rate plans is the result of a number of factors: many customers remain on their original rate plan on a month-to-month basis long after the end of their contract, after the plan is no longer offered to others, and such plans may differ with respect to treatment of Rollover® minutes, nights and weekends minutes, anytime minutes, and many other plan details; many are corporate plans negotiated to reflect particular customers' needs; and numerous specialized rate plans have been negotiated over time to retain customers or to respond to competition. *Cf. Orloff v. Vodafone AirTouch Licenses LLC,* 17 F.C.C.R. 8987 (2002) (in competitive CMRS environment, haggling to negotiate terms of rate plans is reasonable practice), *aff'd sub nom. Orloff v. FCC,* 352 F.3d 415 (D.C. Cir., 2003).

[43] As noted above, the former AT&T Wireless billing systems are distinguished on the basis of technology. As a result, former AT&T Wireless customers in a given market may be served by two billing systems. And even though one of the two former Cingular billing systems is used for customers served by a given area's network, customers may be located in any state and may use their wireless devices in any part of the country. As a result, each of the four billing systems would need to be able to address the disparate requirements of any state.

would have to be modified simultaneously to produce fifty different bill variants, customized for each of the 250,000 rate plans. It would be exceedingly difficult to update these multiple systems for all rate plans to comply with multiple states' mandates while also serving consumers' interests in receiving clear, non-misleading information regarding their services and the costs of such services. And however difficult it might be to construct four separate billing systems for each of fifty or more jurisdictions' regulations standing alone, it would be even more difficult to create a single unified billing approach on all four systems that satisfies the detailed requirements of every one of these jurisdictions.

Telecommunications billing systems are extremely complex. They must process enormous amounts of information about the billions of minutes of use by more than 50 million customers each month very rapidly in order to produce timely bills in a standardized format. Space on the pages of the bill is at a premium, both because customers do not want an unwieldy thick stack of pages and because producing a voluminous bill raises printing and postage costs and, in turn, the cost of service.

In order to manage the timely production of bills, Cingular must place limits on the amount of verbiage associated with the elements of the bill. Call detail, for example, is limited to one line per call, with fixed maximum field sizes to ensure each call is described adequately in one line. Similarly, an efficient bill production process requires limits on the amount of information that can be provided regarding any given "line item" on the main part of the bill. The software used to produce bills has coded-in limitations on field sizes and line item descriptions. Changes to typefaces or font sizes and styles require extensive work to implement, due to the need to manage the length and appearance of the bill and ensure that all fonts are supported both in the billing system and by the printing vendor who actually produces the bill.

As a result, *any* change to the bill format requires software modifications that must be extensively tested to ensure that the bills produced thereby not only meet regulatory requirements but also convey the relevant information timely, efficiently, and in a well-formatted, readable manner. Cingular must provide the software developer a detailed specification of the changes and go through several iterations of software testing before the modifications can be brought on line, a process that can take up to 12 months, or even more for a significant change. Even a minor change takes six months or more to implement, given the schedule for software upgrades, which is locked down months in advance of implementation.

Producing a different billing format for each of some fifty jurisdictions would be fifty times as complex (and much more costly) as making a change to a single standardized format, because, in effect, fifty or more separate billing systems would have to be developed, each capable of dealing with hundreds of thousands of rate plans.[44] The complexity and cost of proceeding in this manner would be prohibitive. Cingular expects that its own cost of developing and deploying fifty different variants on its billing systems alone would be hundreds of millions of dollars.

Not only billing systems would be affected. There also would need to be extensive changes to Cingular's web interface, its point-of-sale systems, its customer care operations, and other systems, so that a consumer could obtain the information that is relevant to his or her particular state when purchasing service or obtaining assistance. Obviously, there would be major challenges in providing accurate customer assistance regarding fifty or more different billing variants. Training expenses would be much higher, and there would still be a significant risk of

[44] Moreover, it is not always immediately clear which state's requirements should be followed. The state in which the billing address is located may not be the state in which the wireless device is used or the service is rendered.

customer confusion when consumers are given different information depending on their jurisdictions. All of the different systems would have to be kept in sync whenever changes are made.

Moreover, even a single small change to the core billing system, format, or content would have to be migrated to all of these various systems, vastly multiplying the cost of updating software or making format changes. When all of the various affected systems are taken into account, billing differently in each jurisdiction could cost a company such as Cingular billions of dollars — raising the cost of service to consumers and increasing the opportunity for error, while providing no clearer or more accurate information. Moreover, the complexity of operating fifty different billing variants would very likely require reducing the number of billing cycles within a month, reducing the billing systems' responsiveness to consumer needs. This complexity also works against consumers' interests by delaying the roll-out of new services or even preventing some new services from being offered.

An alternative to operating fifty or more billing formats would be to comply with *all* states' requirements in a single billing format that satisfies the requirements of any given state. As the *Vonage Holdings* decision intimates, this is the logical consequence of state regulation of service that is not limited to a given state's boundaries. This approach, however, is unlikely to comply with the FCC's requirements. If each state were free to prescribe labels, typefaces, and font sizes and styles, a bill complying with all states' requirements would resemble "ransom notes," containing line items like this hypothetical example:[45]

[45] This example is purely hypothetical and does not purport to represent any particular state's actual formatting or labeling requirements. It was constructed to illustrate the "worst case" result of conflicting state regulation of billing format on a single line item.

Universal Service Fund (CA, DE, MN, NH: Federal Universal Service Fund Recovery; DC: Federal Universal Service Fund Taxation Without Representation; AL, FL, LA, NY: USF Recovery Charge; CT, NC, WI: **Federal Universal Service Charge**; AK, IA, ND: **Federal Universal Service Fund Contribution Recovery**; AZ, NJ: *Federal Universal Service Pass-Through*; AR, IL, NV, VT: Federal Universal Telephone Service Support Charge; IN, ME, OR, WA: **FUSF Contribution Recovery**; PA, MO, WY: FEDERAL UNIVERSAL SERVICE RECOVERY (NOT A TAX); ID, MS, VA: Carrier Recovery of Federal Universal Service Support; MD, NM, OH, SC, SD, UT: **CARRIER RECOVERY OF SUPPORT FOR FEDERAL UNIVERSAL SERVICE**; PR, VI: ***North American FUSF Contribution Recovery***; CO, TN, KY: **Support for Fed. Univ. Tel. Serv. Fd.**; TX: **FEDERAL UNIVERSAL SERVICE FUND SUPPORT**)	1.25

This example shows that simultaneously complying with multiple, divergent requirements is not an option: it produces a result that is neither brief nor clear, and it is questionable whether it is non-misleading. Moreover, if all of the line items on the bill had to address multiple states' requirements as to fonts and descriptions in this way, the size and complexity of the bill would grow enormously. Such a bill might satisfy each state's individual specifications, but in so doing would be so unwieldy and confusing as to flunk the FCC's requirements. This example illustrates the difficulties faced by a company providing CMRS in multiple jurisdictions when it tries to comply with the separate requirements of fifty or more states, districts, and territories, even if those requirements do not individually appear to conflict directly with FCC requirements.

Moreover, producing content such as this — if it could somehow satisfy both state and federal requirements — would also clearly increase the cost of bills significantly, due to the bills' added bulk and higher postage. In other words, complying with state billing requirements as well as federal standards necessarily poses a financial obstacle to interstate commerce.

The foregoing discussion assumes that bills *could* in fact be produced that satisfy specific state requirements regarding typefaces and font sizes and styles. The actual systems used to produce bills, however, are not word processing programs providing the flexibility to use fonts and typefaces as desired in a free-flowing form. They are data processing systems that are designed to place data in predetermined fields, with limited font and typeface capabilities. Ordinarily, a given field is produced by retrieving a data element from a database and rendering it in a single font and size in a fixed position. Reprogramming these systems to comply with varying font size and typeface requirements would require fundamental rebuilding of the databases and the billing systems. In point of fact, even a seemingly simple change to billing format, such as increasing a textual field's width by a single character, can be complex to implement because of its effects on other components of the bill and the database changes required.

These costs and burdens can be avoided by applying uniform, broad federal standards and foreclosing state regulation of CMRS billing. The Commission need not regulate details such as formatting and font size. All it needs to do is require that carriers' bills are brief, clear, and non-misleading, as it has already done. A carrier producing bills satisfying these FCC requirements and FCC interpretations of these requirements should not be subject to separate state regulation of the billing format, regardless of where the service is provided or where the bill is sent.

Preemption of state regulation of CMRS billing will not deprive consumers of legal recourse for unlawful billing practices by carriers. As noted above, the regulation of carrier billing practices falls squarely within the Commission's statutory authority. Moreover, the Commission has emphasized "that a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b) of the Act."[46] Thus, under Section 207 of the Act, consumers have recourse to either the Commission or federal court for alleged unlawful billing practices. It is also possible for state public service commissions to file billing complaints with the Commission on behalf of resident consumers.[47]

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46 *TIB Order*, 14 F.C.C.R. at 7506 ¶ 24.

47 *See* 47 U.S.C. § 208 (a).

C. Federal Policies and Objectives Require Uniform Federal CMRS Billing Standards

State regulation of CMRS billing should be preempted because it would negate clear and identifiable federal objectives regarding CMRS. The Commission has adopted a broad national framework to address wireless billing. That framework will be compromised by allowing fifty states to regulate the same providers and the same bills that are already comprehensively addressed by the FCC's policies and rules.

1. Promotion of Nationwide CMRS Competition

Since the inception of wireless telecommunications services, the Commission has made clear its intention that such services would best develop on a competitive and nationwide basis. As early as 1949, the Commission sought to promote wireless competition nationwide, although this competition was initially seen as occurring at the local level.[48] The Commission later emphasized the importance of cellular service at the national level and found that state and local regulation could conflict with the achievement of important federal policy objectives:

> Common carrier mobile telephone and dispatch services have an important role to play in our national telecommunications policy planning and we are particularly concerned that a cellular subscriber traveling outside of his local carrier's service area should be able to communicate over a cellular system in another city. . . . Many expect that the availability of cellular service will increase the demand for mobile telephone service and foster a competitive environment. If state and local entry policies conflict with our intent to stimulate the growth of a nationwide mobile communications service, these expectations may be frustrated. . . . Cellular systems will serve both local and national purposes in providing to the consumer the ability to place a mobile radio call regardless of geographic location.[49]

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48 *General Mobile Radio*, 13 F.C.C.R. 1190, 1281 (1949).

49 *Cellular Communications Systems*, 78 F.C.C.2d 984, 997-98 (1980); accord *id.*, *Cellular Order*, 86 F.C.C.2d at 503, 504 & n.74 ("Throughout the cellular proceeding an essential objective has been for cellular service to be designed to achieve nationwide compatibility. . . . [A] cellular subscriber traveling outside of his or her local service area should be able to communicate

(footnote continued on next page)

More recently, Congress amended Sections 2 and 332 of the Act to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[50] Its objective was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[51] Section 2(b) was amended to exclude wireless services from the general prohibition on Commission regulation of intrastate telecommunications services, thereby exempting wireless services from the system of dual state and federal regulation that governs wireline telephone services.[52] Section 332 was amended to include express statutory preemption of "the entry of or the rates charged by any commercial mobile radio service," with the caveat that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[53] Congress also authorized the Commission to reduce the burdens of regulation on CMRS providers in light of the competitive conditions in the industry by forbearing from applying provisions of Title II that were unnecessary for the protection of consumers,[54] but left in place the "bedrock consumer protection" afforded by Sections 201 and 202.[55]

(footnote continued)

over a cellular system in another city. Nationwide compatibility is also likely to increase the number of manufacturers providing the cellular equipment. . . . [T]he federal scheme for the provision of cellular service set forth in this order, and principally the goal of introducing nationwide compatible cellular service without undue delay, also provides an independent basis for this Commission having sole jurisdiction over licensing of cellular facilities. . . . As noted earlier, cellular systems can provide both intrastate and interstate communication."), recon. in part, 89 F.C.C.2d 58, 95-96 (1982).

50 H.R. Rep. No. 103-213, at 490 (1993) (footnote omitted).

51 H.R. Rep. No. 103-111, at 260 (1993).

52 *See* 47 U.S.C. § 152(b).

53 47 U.S.C. § 332(c)(3). As discussed below, while Section 332 does not preclude state regulation of other terms and conditions, it also does not expressly preserve state regulatory authority over such matters.

54 *See* 47 U.S.C. § 332(c)(1)(A)(ii). Congress subsequently has given the Commission even more extensive authority to reduce the regulation of telecommunications carriers, including CMRS providers, where regulation is not necessary to protect consumers in light of market con-

(footnote continued on next page)

Congress determined that centralizing regulatory authority over wireless telecommunications in this way was warranted because a "*uniform national policy is necessary and in the public interest*."[56] At the same time, Congress expressed what has been described as a "general preference in favor of reliance on market forces rather than regulation" and sought to accelerate the evolution of an "economically vibrant and competitive market for CMRS services."[57]

2. The National, Interstate Character of Today's CMRS Industry Requires Uniform Federal Billing Standards

The promotion of nationwide development of competitive wireless telecommunications services through uniform, federal regulatory policy and limited, market-oriented regulation has been a success. CMRS has evolved from a predominantly local service to a nationwide service, operating without regard to state boundaries. Carriers offer a wide variety of popular calling plans that provide customers with nationwide service, covering usage throughout nationwide extended networks and allowing calls from points across the country to anywhere else. These plans are offered by all major carriers and are marketed nationwide at uniform rates in a highly competitive environment.

Furthermore, CMRS typically is offered as an integrated package and billed on a unitary basis in which monthly and per-unit charges cover interstate and intrastate services without distinction. In other words, neither rates nor billing practices of carriers are separable into interstate and intrastate components for regulatory purposes. There is a single bill that pertains to the *rates*

(footnote continued)

ditions, reemphasizing the Congressional objective of facilitating regulation by market forces wherever possible. *Id.* §§ 160, 161.

55 *TIB Order,* 14 F.C.C.R. at 7503 ¶ 19, n.32, quoting *Wireless Forbearance Order,* 13 F.C.C.R. at 16865.

56 H.R. Rep. No. 103-111, at 480-81 (1993) (emphasis added) (incorporating findings set forth in Senate amendment).

57 *Connecticut Department of Public Utility Control,* 10 F.C.C.R. 7025, ¶¶ 8, 10 (1995).

for both interstate and intrastate services, without regard to where the customer may have used his or her wireless device or the origination or termination of the call. Uniform federal standards should therefore govern the billing for such service.

Carrier bills provide the *rates* charged for service, over which states have no jurisdiction due to the express preemption of state rate regulation in Section 332. In this regard, the Commission has held that a carrier's billing practices for its own services constitute an integrated part of those services and aresubject to the Commission's authority under Title II of the Act:

> [T]he telephone bill is an integral part of the relationship between a carrier and its customer. As such, the manner in which charges and providers are identified on the telephone bill is essential to consumers' understanding of the services that have been rendered, the charges imposed for those services, and the entities that have provided such services.[58]

In short, the Commission has made a determination that federal regulation of CMRS billing is necessary to further the federal objective of maintaining nationwide, competitive wireless telecommunications services. The Commission has held already that state attempts to prohibit particular line items constitute rate regulation in violation of Section 332. The same reasoning governs the remainder of the bill, which is nothing more or less than the carrier's mechanism for collecting charges that are exempt from state regulation. Just as the bill is inherently wrapped up in the service provided, it cannot be separated from the rates charged for those services.

Moreover, as discussed above, Titles II and III of the Act provide the Commission with broad legal authority over CMRS billing practices. The Commission exercised that authority in the *TIB Order* and *Second R&O*, establishing federal billing standards requiring that billing descriptions must be clear and non-misleading, imposing those standards on the CMRS industry, and deciding to enforce the standards on a case-by-case basis. These decisions reflect a careful

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58 *TIB Order*, 14 F.C.C.R. at 7503 ¶ 20.

balance of the fundamental interests of the consumer, the public interest in the promotion of competition in the provision of nationwide wireless services, and the interests of service providers, all founded on the "bedrock consumer protection obligations of common carriers" codified by Sections 201 and 202 of the Act.[59]

Permitting continued state regulation of billing will result in different requirements in each jurisdiction. This will upset the Commission's carefully drawn balance, impair national competition, increase costs to consumers, and impose conflicting standards on service providers. For example, as the Commission has recognized with regard to state regulation of line items:

> That . . . [state] regulation would affect a CMRS carrier's rates and rate structure is particularly evident when considering that most CMRS carriers . . . market and price their services on a national basis. A CMRS carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction.[60]

CMRS billing should not be subject to state regulation either. The Commission's decision to regulate CMRS billing on a case-by-case basis under broad standards necessarily requires that all decisions be made at the federal level in the interest of orderly development of case law and uniformity of application. State regulation establishing substantive standards for the clarity, content, layout, and accuracy of CMRS bills will force carriers to adhere to a varying patchwork of state requirements, a result the Commission has already rejected in connection with line items on grounds that are equally applicable here.

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59 *TIB Order,* 14 F.C.C.R. at 7503 ¶ 19, n.32, *quoting Wireless Forbearance Order*, 13 F.C.C.R. at 16865.

60 *Second R&O* at ¶ 31.

The Commission correctly found in the *Second Further Notice* that there are several valid legal premises for preempting state regulation of carriers' billing practices.[61] Cingular agrees and urges the Commission to exercise its authority to "reverse [its] prior pronouncement that states may enact and enforce more specific truth-in-billing rules."[62]

D. State Regulation of Billing Would Frustrate Federal Purposes and Should be Preempted

1. The Commission May Preempt State Regulation Using Market Forces as a Regulatory Tool

As discussed above, federal law preempts state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[63] Federal regulations can have the same preemptive effect as a federal statute and where Congress has directed an agency to regulate, an agency decision to preempt state regulation is subject to judicial review only to determine whether it has exceeded its statutory authority or acted arbitrarily.[64] In short, a federal agency may preempt state regulation when it is necessary to protect a valid federal regulatory objective and "state regulation would 'negate[ ] the exercise by the Commission of its own lawful authority.'"[65]

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61 *Second Further Notice* at ¶ 51.

62 *Id.*

63 *Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153 (1982).

64 *See City of New York v. FCC,* 486 U.S. 57, 64 (1988); *United States v. Shimer*, 367 U.S. 374, 381-382 (1961).

65 *Pub. Serv. Comm'n of Maryland v. FCC,* 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 880 F.2d 422, 429-31 (D.C. Cir. 1989); *see also Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C. Cir. 1989); *Pub. Util. Comm'n of Texas v. FCC,* 886 F.2d. 1325, 1331-33 (D.C. Cir. 1989)); *California v. FCC*, 567 F.2d 84, 86-87 (D.C. Cir. 1977); *North Carolina Util. Comm'n v. FCC,* 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) ("*NCUC II*"); s*ee also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C. 2d 469, 504 ¶ 82 (1981) (preempting state regulation over technical standards and market structure for cellular service because any state licensing or franchising requirements in "addition to or conflicting with" the federal requirements "could frustrate federal policy").

For example, in *California v. FCC,* the Court upheld the Commission's preemption of certain state regulations of enhanced services provided by Bell Operating Companies ("BOCs"). The Court reasoned that preemption was appropriate because the state regulation is inconsistent with and would effectively negate the Commission's policy choices.[66]

> [T]he Commission acknowledges that the BOCs could comply with structural separation requirements, but contends that it would not be economically or operationally feasible for them to do so. The BOCs would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services, thereby defeating the Commission's more permissive policy of integration. We conclude that the impossibility exception, as applied in the *NCUC* cases, authorizes the Commission's preemption of state structural separation requirements here.[67]

Furthermore, where an agency has chosen to rely on market forces as a regulatory tool — as the Commission has chosen with respect to billing for CMRS carriers — the agency may preempt the states from stepping into that intentionally created void. For example, in *Computer and Communications Industry Association v. FCC*, the Court found that the Commission had authority to preempt state tariffing requirements for customer premises equipment.[68] The Commission justified its preemption on a finding that its "policy of promoting the 'efficient utilization and full exploitation of the interstate telecommunications network' is furthered by fostering competition in the CPE market and giving consumers an unfettered selection of CPE," and "the inclusion of CPE in charges for intrastate transmission service will certainly influence the consumer's choice of CPE."[69] Citing the *NCUC* cases,[70] the Court upheld the Commission's judgment, finding that:

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66 *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1995).

67 *Id.* (footnotes omitted).

68 *Id.*, 693 F.2d 198, 215 (D.C. Cir. 1982).

69 *Computer and Communications Indus. Ass'n.*, 693 F.2d at 214.

> Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.[71]

Indeed, the Court ruled that the operative principle that demanded preemption of state tariffing for CPE charges — that state regulations that would impede the Commission in its effort to fulfill its statutory duty must be preempted — was "precisely the principle that demanded state preemption in the *NCUC* cases."[72]

The Court rejected arguments that the Commission preemption of state CPE tariffing requirements was unlawful because the Commission's decision created a regulatory vacuum and preemption of state regulation can only be accomplished by affirmative regulation that occupies the field.[73] In the Court's view, such arguments:

> … misapprehend the Commission's actions. Although the Commission has discontinued Title II regulation of CPE, it has substituted a different, affirmative regulatory scheme through its ancillary jurisdiction. Furthermore, we perceive no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction. It is clear to us that the *Computer II* regulations embody a comprehensive federal regulatory scheme, including rules governing the marketing of CPE by common carriers. We agree with the Second Circuit: 'Federal regulation need not be heavy-handed in order to preempt state regulation' . . . . We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications industry and that the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capri-

(footnote continued)

70 *See North Carolina Util. Comm'n v. FCC,* 537 F.2d 787, 793-95 (4th Cir. 1976) (finding that Section 2(b) of the Act deprives the Commission of authority over intrastate services and facilities only where "their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications"); *see also NCUC II,* 552 F.2d at 1044-52 .

71 *Computer and Communications Indus. Ass'n.,* 693 F.2d at 214 (footnotes omitted).

72 *Id.* at 216.

73 *Id.* at 217.

> cious, nor an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.[74]

This analysis applies to the Commission's regulation of CMRS billing. As discussed above, the Commission has imposed general, substantive standards governing billing clarity, content, layout, and accuracy on CMRS providers and has elected to enforce those standards on a case-by-case basis. In essence, the Commission has chosen to rely on market forces, backed up by its Section 201 and 202 enforcement authority, rather than codify in detail regulations covering the clarity, content, layout, and accuracy of CMRS bills. This judgment is well within the Commission's broad authority over billing matters. It follows that any state regulation that interferes with this valid federal policy must be preempted.

2. State Initiatives With Regard to CMRS Billing Conflicts with the Federal Billing Regulatory Framework

As the Commission has recognized, wireless carriers are facing an increase in state legislative and regulatory initiatives regarding wireless billing and billing format which, in effect, conflict with the Commission's pro-competitive federal scheme for billing regulation under the Act.[75] California is perhaps the most far-reaching example of state regulatory efforts regarding CMRS billing.[76]

The rules recently considered by the California Public Utilities Commission, to implement its Telecommunications Consumers Bill Of Rights would have comprehensively regulated all aspects of the customer-carrier relationship from before its inception until after its termination.

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[74] *Id.* at 217 (footnotes omitted).

[75] *Second Further Notice* at ¶ 50.

[76] The California Public Utility Commission's ("CPUC") Consumer Bill of Rights were indefinitely stayed in January 2005. In May, 2005, however, the California Senate passed legislation that would adopt consumer protection rules almost as comprehensive as the Cosumer Bill of Rights. Jeffrey Silva, *Calif. Senate OKs bill of rights for telecom*, RCR Wireless News, May 27, 2005, at 13.

With respect to billing, the California rules would have, imposed sweeping requirements on the format of CMRS providers' bills, including requirements governing how the bills are organized and the information that must be included (Rule 6). The CPUC rules have been stayed, but many of their provisions have been incorporated into pending legislation[77] and the CPUC is considering an even more comprehensive set of regulations.[78]

California is far from the only state with legislative or regulatory initiatives aimed at regulating CMRS carriers' bills. Indeed, Cingular is aware of at least six other proposed state legislative initiatives that would regulate the content and form of a CMRS carrier's bills:[79] (a) Connecticut Senate Bill No.81, An Act Concerning A Cell Phone Users' Bill of Rights; (b) Massachusetts Senate Bill No. 1790, An Act Establishing a Cell Phone Users Bill of Rights;[80] (c) New Jersey Assembly Bill No. 3935, Wireless Telephone Consumer Protection Act; (d) New York Senate Bill No. 4263, Wireless Telephone Consumer Protection Act; (e) New York Assembly Bill No. 8539, Wireless Telephone Consumer Protection Act of 2005; and (f) Wisconsin Assembly Bill No. 334.[81] These bills mandate (or would require the relevant state commission to promulgate rules that mandate) various requirements on organization of bills, language that can or cannot be included, where certain charges can be located in a bill and the kinds of disclosures that must be made. In addition to these specific state initiatives, the American Association

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77 California Senate Bill No. 1068.

78 *See* CPUC, *Revised Consumer Bill of Rights Proposed; Expanded Proposal Includes "Internet Freedom" and "Naked DSL*," June 9, 2005, *at* http://www.cpuc.ca.gov/PUBLISHED/NEWS_RELEASE/46030.htm. This proposal mirrors the bill of rights that the CPUC approved previously except for adding Internet Freedom and Naked DSL to the basic list of rights that should be guaranteed to consumers.

79 Except for the California legislation, these state legislative initiatives are specifically aimed at wireless carriers.

80 This bill establishes a cellphone users' bill of rights and provides for specific contract term limits, and regulates rate and advertising disclosures.

81 This bill would grant the state commission rulemaking authority over the regulation of mobile telephone service providers and access to mobile telephone numbers.

of Retired Persons ("AARP") has proposed to state legislatures a Model Act, setting forth specific requirements regarding CMRS billing that similarly mandate requirements for form and content, including a set font size and inclusion of specific language they set forth in the Model Act.[82]

Viewed in isolation, the requirements in the proposed bills and Model Act may not be considered to be overly burdensome. Permitting states to regulate CMRS billing in this manner, however, creates the real possibility that states will develop conflicting requirements and interpretations, particularly where the state legislature sets forth broad requirements and then requires the state commissions to promulgate more specific rules. As noted above in Section I.B, for a carrier to produce a different billing format for each of some fifty jurisdictions is extraordinarily complex and costly because, in effect, fifty or more separate billing systems would have to be developed, each capable of dealing with hundreds of thousands of rate plans. Indeed, Cingular estimates that its own cost of developing and deploying fifty different variants on its billing systems alone would be hundreds of millions of dollars.

Moreover, all of these initiatives, on their face, conflict with the Commission's pro-competitive federal scheme for truth-in-billing regulation under the Act. Simply put, the Commission has chosen to regulate CMRS billing through general, substantive standards regarding billing clarity, content, layout, and accuracy to be enforced on a case-by-case basis through sections 201 and 202 of the Act. Prescriptive state regulation of CMRS billing necessarily conflicts with the Commission's fundamental policy judgment on this point. Further, to the extent that state regulations are redundant with the Commission's requirements, they would impose an un-

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[82] *See Ex Parte* of Nextel Communications, Inc., CG Docket No. 04-208, (filed Dec. 22, 2004), (see attached exhibit from AARP, *Wireless Telecommunications Consumer Protection Act, A Model State Statute*, September, 2003) ("Model Act") at § 4.

necessary regulatory burden on the operation of the competitive CMRS market. More important, to the extent some states are proposing to go well beyond the Commission's general billing standards, such action would directly conflict with the Commission's billing policies and rules.

E. Nothing in the Act Requires the Commission to Preserve a State Role in Regulating CMRS Billing Practices

1. Section 332(c)(3) Does Not Impair FCC Authority to Preempt State Regulation of CMRS Billing

The Commission asks commenters to "address the proper boundaries of 'other terms and conditions' under Section 332(c)(3)(A) of the Act, and generally to delineate what they believe should be the relative roles of the Commission and the states in defining carriers' proper billing practices.[83] As discussed above, the states no longer have a justifiable role in the regulation of CMRS billing matters. Nothing in the "other terms and conditions" language of Section 332(c)(3) compels a contrary conclusion.

Section 332(c)(3) states, in pertinent part:

> … no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*[84]

This "other terms and conditions" language of this provision has frequently been described as "preserving" state regulation over CMRS.[85] Further, the legislative history of this provision also suggests that the "other terms and conditions" language includes state regulation of billing and advertising practices, which "is not a regulation of the carriers' charges."[86] Thus, a

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83 *Second Further Notice* at ¶ 52.

84 47 U.S.C. § 332(c)(3) (emphasis added).

85 *See, e.g., State of California*, 10 F.C.C.R. 7486, 7549 (1995); *Decastro v. AWACS, Inc.*, 935 F. Supp. 541, 552 (D. N.J. 1996); *GTE MobilNet of Ohio v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997); *CTIA v. FCC*, 168 F.3d 1332, 1335 (D.C. Cir. 1999).

86 *Second Further Notice* at ¶ 53.

casual reading of Section 332(c)(3) may suggest to some readers that the Congress intended to limit the Commission's authority to preempt state regulation of CMRS billing.

However, such a reading, fails to take into account the phrase, "except that this paragraph," which precedes the "other terms and conditions" language. The reference to "this paragraph" makes clear that Congress was preserving state regulation of "other terms and conditions" *only* against the preemptive effect of Section 332(c)(3) itself. The legislative history of Section 332(c)(3) similarly states that "nothing *here* shall preclude a state from regulating other terms and conditions of commercial mobile services," leaving open the possibility that state regulation of other terms and conditions of service might be preempted on other grounds.[87] Thus, when correctly read, the "other terms and conditions" does not preserve state regulatory authority over other terms and conditions, but merely exempts that authority from the preemptive effect of Section 332(c)(3).

There is no indication in the text or legislative history of Section 332(c)(3) that Congress intended to grant new jurisdiction to the states that they previously did not have. States had no authority, for example, to regulate interstate telecommunications services before 1993, and the statute does not grant them that authority. Rather, states had authority only over *intrastate* communications, and after 1993 they continued to have that same authority, except insofar as their authority was narrowed by Section 332 or some other provision of federal law.

CMRS is not, however, a purely intrastate service; as discussed above, it is a jurisdictionally mixed service, and bills for CMRS are not purely intrastate; they are part of a service with both interstate and intrastate elements. Since 1993, states continue to have jurisdiction over the purely intrastate aspects of those bills, pursuant to the "other terms and conditions" clause. Nev-

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87 H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 261 (emphasis supplied).

ertheless, the bills' intrastate and interstate aspects cannot be separated. Typical plans today do not include separate charges for interstate and intrastate usage. The monthly fee, the peak and off-peak per-minute charges, the ringtone download charges, and the data usage charges are all jurisdiction-insensitive. As a result, the exertion of valid federal authority over the same bills has a preemptive effect on state laws.

Thus, Section 332 does not impede the Commission's authority to preempt state regulation of billing practices. This reading of Section 332(c)(3) finds support in the Commission's *CMRS Second Report*, which implemented the 1993 amendments to Section 332. In that decision, the Commission recognized that its then-new CMRS rules did "not prohibit the States from regulating other terms and conditions of commercial mobile radio service," but properly concluded that it retained authority to preempt where "State[] regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry."[88]

2. No Other Provision of the Act Impairs FCC Authority to Preempt State Billing Regulation

There are court decisions suggesting that Sections 2(b), 332(c)(3), and 414 of the Act, when read together, indicate that Congress intended to preserve a state role in the regulation of CMRS and thus necessarily limit the Commission's preemptive power over state regulation.[89] Nothing in these statutory provisions or the court decisions themselves, however, limit in any way the Commission's broad authority to preempt state regulation of CMRS billing.

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88 *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, *Second Report and Order*, 9 F.C.C.R. 1411, 1506 n.517 (1994).

89 *See, e.g., Esquivel v. Southwestern Bell Mobile Systems, Inc.*, 920 F. Supp. 713 (S.D. Texas 1996)*; Decastro*, 935 F.Supp. at 552.

First, the cases discussing Sections 2(b), 332(c)(3), and 414 of the Act are distinguishable on their facts. Stated generally, these cases deal with questions of removal to federal court and whether Section 332(c)(3) constitutes "complete preemption." Specifically, these cases involved situations in which a defendant carrier sought to remove a state law complaint to federal court based on federal question jurisdiction by invoking the "complete preemption" doctrine. Relying in part on Sections 2(b) and 414, some courts have held that Section 332(c)(3) does not itself "completely preempt" state law to the extent required to confer removal jurisdiction on the federal district courts.[90] However the complete preemption doctrine "functions as a narrowly drawn means of assessing federal removal jurisdiction";[91] it does not speak to whether the Commission can and should preempt state billing regulation based upon traditional preemption doctrines that go beyond Section 332(c)(3).

Second, nothing in the statutory provisions themselves necessarily limits the Commission's authority to preempt state regulation of CMRS billing. For example, while Section 2(b) of the Act generally restricts Commission jurisdiction over intrastate communications, that is the case only to purely intrastate communications and aspects of jurisdictionally mixed services that are capable of being separated between interstate and intrastate jurisdictions. The Commission has a long history of preempting state regulation that nominally is addressed to intrastate services where the service at issue is in fact jurisdictionally mixed and thus subject to the Commission's

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90 *But see Bastien v. AT&T Wireless Services, Inc.* 205 F.3d 983 (7th Cir. 2000) (state-law claims based on alleged lack of CMRS coverage completely preempted). We note that the Supreme Court's recent clarification of the complete preemption doctrine in *Beneficial National Bank v. Anderson,* 539 U.S. 1 (2003), invalidates the analysis of many of the decisions concluding that the Communications Act does not "completely preempt" state law claims challenging CMRS rates or entry for removal purposes.

91 *Smith v. GTE Corp*., 236 F.3d 1292, 1313 (11th Cir., 2001) (citation omitted).

interstate jurisdiction.[92] Moreover, the Supreme Court has ruled that the practical effect of Section 2(b) is limited by operation of Section 201(b) which provides the Commission with authority to implement all of the provisions of the Act, including those that apply to intrastate communications.[93] Simply put, as a matter of law, the Commission's authority prevails in the case of any conflict with concurrent state jurisdiction under Section 2(b) that cannot be resolved because the service cannot be separated into interstate and intrastate components.

Finally, Section 414 of the Act does not hamper the Commission's ability to preempt state regulation of billing practices. Section 414 is referred to as a "savings clause" and provides:

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.[94]

As the Commission has observed, however, "[u]nder accepted principles of statutory construction . . . the savings clause cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."[95] The courts have also interpreted this provision to yield to the substantive terms of the Act.[96] Thus, where the Commission has validly exercised its broad authority under the Act to establish specific federal rules and policies, as it has done with regard to billing, Section 414 cannot be interpreted to preserve state jurisdiction in a manner that would contravene the Commissions' actions.

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92 *Louisiana PSC*, 476 U.S. at 355; *Vonage Holdings Corp.*, 19 F.C.C.R. at 22418-19 ¶ 23.

93 *Iowa Utils. Bd.*, 525 U.S. at 380-81.

94 47 U.S.C. § 414.

95 *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17040 ¶ 37 (2000).

96 *See, e.g.*, *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 227-28 (1998) (section 414 "cannot in reason be construed as continuing . . . a common law right . . . which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." (alterations in original) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *Bastien*, 205 F.3d at 987-88 (Section 414 does not save state law claims challenging adequacy of CMRS network from preemption).

II. PREEMPTION OF STATE REGULATION OF CMRS BILLING IS SUPPORTED BY THE COMMERCE CLAUSE

The principles embodied in the Commerce Clause provide substantial support for preemption of state CMRS billing regulation. The Supreme Court has established that the fundamental purpose of the Commerce Clause is to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[97] "Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.'"[98] As a result, "the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."[99] This negative aspect of the Commerce Clause, "'known as the dormant Commerce Clause,' . . . 'create[s] an area of trade free from interference by the States,'" and thus "prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'"[100]

Under the dormant Commerce Clause case law, "a state law that 'has the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders' is a violation of the Commerce Clause."[101] Moreover, state laws and regulations "that impose burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'" violate the dormant

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97 *Hughes v. Oklahoma*, 441 U. S. 322, 325–326 (1979), *quoted in Granholm v. Heald,* No. 03-1116, slip op. at 8 (U.S., May 16, 2005).

98 *Am. Trucking Ass'n., Inc. v. Michigan Pub. Serv. Comm'n*, No. 03–1230, slip op. at 3 (June 20, 2003), *quoting Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

99 *Granholm,* slip op. at 13.

100 *Am. Trucking Ass'n.*, slip op. at 3, *quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 180 (1995) and *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 328 (1977).

101 *Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22427 n.132 (2004), quoting *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989), *citing Cotto Waxo Co. v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995).

Commerce Clause.[102] In particular, "courts have held that 'state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.'"[103]

The need for cohesive national treatment is particularly acute in the field of telecommunications. Section 1 of the Act provides that the Commission was created, *inter alia*:

> … to make available, so far as possible, to all of the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges for the purpose of the national defense, for the purpose of promoting safety of life and property . . . *and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication*.[104]

As a result, the Act grants the Commission plenary jurisdiction over interstate communications, occupying the field.[105] States, on the other hand, may regulate only intrastate service.[106]

The Commission recently applied these fundamental constitutional principles when it determined that preemption of an order of the Minnesota Public Utilities Commission ("Minnesota Commission") applying the state's traditional telephone company regulations to Voice over Internet Protocol ("VoIP") services was supported by the Commerce Clause principles. The

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102 *Amer. Trucking Ass'n.*, slip op. at 3, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

103 *Vonage Holdings*, 19 F.C.C.R. at 22427 & n.134, *quoting Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997); *citing Wabash, St. Louis & Pac. Ry. Co. v. Illinois,* 118 U.S. 557 (1886).

104 47 U.S.C. § 151 (emphasis supplied).

105 *See* 47 U.S.C. § 152(a); *see also Louisiana PSC v. FCC*, 476 U.S. 355, 360 (1986) (Commission has "plenary authority" over interstate service); *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 490 (2d Cir. 1968) ("The Supreme Court has held that the establishment of this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law.").

106 47 U.S.C. § 152(b)

Commission concluded that regulation of VoIP by Minnesota would likely have "the 'practical effect' of regulating commerce occurring wholly outside that [s]tate's borders."[107]

Because the location of VoIP customers cannot practicably be determined, the Commission reasoned that the service provider would have to comply with the Minnesota regulations even with respect to "communications that do not originate or terminate in Minnesota, or even involve facilities or equipment in Minnesota — in order to ensure that it could fully comply with the regulations for services in Minnesota."[108] This would be the case even if the service provider discontinued seeking subscribers in Minnesota, because VoIP end users could still use the service from any broadband connection in Minnesota.[109] Accordingly, the Commission found that the burdens Minnesota's regulations would impose on interstate commerce would be "clearly excessive in relation to the putative local benefits."[110]

The Commission's analysis in that case is fully applicable to the question of whether state regulation of CMRS billing is preempted. CMRS customers, like VoIP end users, are mobile and their use of the service is not limited to a fixed location in a single state. Indeed, they may have a phone number from an area code in a different state from their billing address and may rarely or never use the service in the state where they receive their bills. For example, an employee of a company in Massachusetts might live in New Hampshire, subscribe to a company-sponsored wireless plan for a phone with a phone number with a Vermont area code that is exclusively used while she is traveling between the company's Massachusetts headquarters and its offices in Vermont and Connecticut, but nevertheless receive the bill at her New Hampshire

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107 *Vonage Holdings*, 19 F.C.C.R. at 22428 n.132, quoting *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989).

108 *Id.*

109 *Id.*

110 *Id.* at 22429, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

home address. New Hampshire might impose rules on bills sent to billing addresses in the state, but those rules would effectively govern service that is provided wholly outside that state, despite the fact that New Hampshire has no regulatory jurisdiction over service provided beyond its borders. To comply with New Hampshire's rules, the service provider would have to tailor its bills to those rules even for communications that are entirely outside New Hampshire. Moreover, Massachusetts, Vermont and Connecticut may also have rules governing the billing for intrastate calls placed within their borders. Thus, as in *Vonage Holdings,* the service provider in this example would have to ensure that its bills comply with *all four* states' billing laws, regardless of where the bills are addressed or where the service is rendered in order to avoid violating state laws governing billing.

The same is true nationwide. CMRS service and billing do not distinguish between interstate and intrastate services. Consequently, a given state's billing regulations would necessarily affect CMRS services that were rendered entirely outside the state and provided by equipment and facilities outside the state, including calls that are neither originated nor terminated within the state. A given regulation might purport to govern billing not only for intrastate communications within the issuing state, but also for interstate communications and intrastate communications within each other state. Some regulations may apply to all bills issued to subscribers at addresses in a state, while others may apply to billing for calls that are originated or terminated in the state, regardless of where that billing occurs. In other words, if billing for such service is subject to one state's regulation it would equally be subject to all other states' regulation as well and, consequently, "it would have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations."[111] CMRS, like VoIP, "is not constrained

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[111] *Vonage Holdings*, 19 F.C.C.R. at 22429 ¶ 41, citing *American Libraries Ass'n v. Pataki,* 969 F. Supp. at 169 ("The menace of inconsistent state regulation invites analysis under the

(footnote continued on next page)

by geographic boundaries and cannot be excluded from any particular state," and, therefore, "inconsistent state economic regulation could cripple development" of the service.[112] By purporting to exercise regulatory jurisdiction over CMRS billing, states are inherently regulating beyond their borders, in excess of their legitimate jurisdictional boundaries.

By so doing, the burdens imposed on interstate commerce far outweigh any local benefit resulting from state billing regulations. There is no significant local benefit achieved by subjecting carriers to billing format requirements that go beyond the requirements imposed by the Commission. The Commission already has taken the interests of consumers into account in developing its billing rules, and consumer protection is afforded by Sections 201, 202, and 205 of the Act. A bill that is clear and non-misleading in accordance with federal standards does not somehow become unclear and misleading with respect to services rendered within some particular state. Moreover, it is unclear, in any event, what jurisdictional basis a state could assert to regulate the billing for service that is either interstate or rendered wholly within a different state. In any event, the net effect would be a substantial burden on interstate commerce.

III. THE COMMISSION SHOULD CONFIRM THAT SECTION 332(C)(3)(A) PROHIBITS ANY APPLICATION OF STATE LAW BY A COURT OR OTHER TRIBUNAL THAT HAS THE EFFECT OF REGULATING THE RATES, RATE STRUCTURE, OR ENTRY OF CMRS PROVIDERS

The Commission properly concluded in the *Declaratory Ruling* that Section 332(c)(3)(A) preempts state laws requiring or prohibiting the use of line item charges by CMRS providers. The Commission also observed that state laws governing disclosure of whatever rates a CMRS

(footnote continued)

Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation — and in particular, the national infrastructure of communications and trade — as a whole.") (*citing Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992)).

[112] *Vonage Holdings*, 19 F.C.C.R. at 22429 ¶ 41.

provider chooses to set and the neutral application of state contractual or consumer fraud laws are not preempted by Section 332.[113] Recognizing that "'the line between prohibited and permissible' state regulations of line items 'may not always be clear,'" however, the Commission also sought comment on "how further to define the scope of Section 332(c)(3)(A)'s preemption."[114]

This is not the Commission's first effort to provide guidance on "the line between prohibited and permissible" state regulation of CMRS practices. In its *Wireless Consumers Alliance* order, the Commission made clear that while damages awards against CMRS providers under state law do not necessarily constitute rate regulation, "a court will overstep its authority under Section 332" if it attempts to adjudicate the reasonableness of a rate in relation to the service offered.[115] The Commission emphasized: "It is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332."[116] Unfortunately, courts have not heeded the Commission's instructions. In many cases, courts have mistakenly held that state-law challenges to CMRS providers' rates and rate structures wrapped in the garb of state-law nondisclosure, contractual and consumer fraud claims are not preempted. In such cases, courts are apt to cite the Commission's statement that Section 332 does not preempt such claims generally, rather than its admonition that preemption depends on the substance of the claim rather than its form.

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113 *Declaratory Ruling* at ¶ 33.

114 *Declaratory Ruling* at ¶ 34 (quoting *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17037 ¶ 28(2000)). This inquiry differs from the Commission's inquiry regarding preemption of state regulation of billing practices generally. Whether Section 332(c)(3)(A) preempts a state law is a matter of Congressional intent and statutory construction. Whether all state regulation of CMRS billing should be preempted in order to accommodate federal telecommunications policy is a matter for the Commission to decide within its proper scope of authority. *See City of New York v. FCC*, 486 U.S. 57 (1988).

115 *Wireless Consumers Alliance*, 15 F.C.C.R. at 17041 ¶ 39.

116 *Id*. at 17036 ¶ 28 (citing *Bastien* with approval)

The class action lawsuits that have been filed against CMRS providers challenging the line item charges that were the subject of the NASUCA petition and the Commission's *Declaratory Ruling* underscore the need for FCC guidance in this area. The enormous cost of implementing wireless local number portability, E-911 Phase II services, and other regulatory initiatives prompted a number of CMRS providers to initiate or increase line item charges designed to recover those costs. This precipitated a deluge of class action complaints filed in state courts across the nation, often by associated plaintiffs' attorneys, against Cingular and others.[117]

The Cingular lawsuits demonstrate how the plaintiffs' class action bar has attempted to defeat federal jurisdiction and preemption by cloaking their claims in state-law terminology, such as "deceit," "breach of contract," and "unjust enrichment."[118] Notwithstanding this artful pleading, it is clear from the substance of the complaints that they sought to have state courts regulate both Cingular's rates and Cingular's rate structure. The complaints required state courts to engage in forbidden *rate* regulation by challenging the amount of Cingular's regulatory cost recovery fee under state law as excessive or "unjust" in relation to Cingular's costs, services provided, or both, and then seeking retroactive adjustment of the amount charged.[119] The com-

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[117] Six putative class action lawsuits have been filed in state courts challenging Cingular's regulatory cost recovery fee: *Bucy v. AT&T Wireless Servs., Inc., Cingular Wireless LLC, et al.*, Case No. Civ. 432021 (Cal. Sup. Ct. San Mateo Co.); *Clinkscales v. AT&T Wireless Servs., Cingular Wireless LLC, Inc. et al.,* Case No. RG03111969 (Cal. Sup. Ct. Alameda Co.); *Wright v. AT&T Wireless Servs., Inc., Cingular Wireless LLC, et al.,* Case No. BC301663 (Cal. Sup. Ct. Los Angeles Co.); *Franczyk v. Cingular Wireless LLC* No. 03 CH 1403 (Ill. Cir. Ct. Cook Co.); *Hobson v. Cingular Wireless LLC,* No. CV-2003-1316 (Ala. Cir. Ct. Jefferson Co. (Bessemer Div.)); *Prieto v. Cingular Wireless LLC,* No. 03-CV-31595JFLFLS (Ga. Super. Ct. Floyd Co.). The three Califorina complaints have been ordered coordinated pursuant to state rule under the caption *Regulatory Programs Fee Cases,* J.C.C.P. No.: 4354 (Cal. Sup. Ct. San Mateo Co.).

[118] *See, e.g., Hobson* Compl., Counts I, II & IV; *Prieto* Compl., ¶¶ 25 & 30; *Franczyk* Compl., Counts I-III.

[119] *See, e.g., Hobson* Compl., ¶ 4 (alleging fee "is not tied to any formula to ensure that a customer's portion of the total assessment collected by Cingular bears a reasonable relationship to the proportionate amount of expenses incurred by Cingular related to a customer"); *id.* ¶¶ 45-

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plaints sought state regulation of wireless *rate structures* by challenging Cingular's legal right to use a separate line-item rate element to recoup those costs,[120] and then demanding that state courts enjoin Cingular from structuring its rates in that manner.[121]

A number of class action complaints challenging the wireless carriers' regulatory cost recovery fees, including four of the Cingular actions, were removed to federal district court and ultimately transferred into a multidistrict litigation proceeding before the Hon. Fernando J. Gaitan, in the U.S. District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1407. The carriers' initial success in invoking the federal multidistrict litigation procedures had the potential to provide a means of ensuring uniformity and due regard for federal policies in determining the extent to which state law would be permitted to regulate CMRS line item charges via the class action device.

(footnote continued)

47 (asserting claim of "unjust enrichment" and demanding refund of "excessive" amounts charged); *Prieto* Compl., ¶ 1-2, 24-25 (alleging fee is an improper "price increase" in relation to the products and services provided by Cingular); *Clinkscales* Compl., ¶¶ 63-64, 88 (asserting that the fee is unlawful because no services were provided in exchange for it); *Bucy* Compl., ¶¶ 63-64, 88 (same); *Wright* Compl., ¶¶ 63-64, 88 (same); *Franczyk* Compl., ¶ 23 (claiming that RCR Fee is an unauthorized "rate" increase and an "improper attempt to pass along [Cingular's] cost of doing business"); *id.* ¶¶ 54-56 (asserting claim for "unjust enrichment" and demanding disgorgement of ***all*** RCR Fee revenues); *id.* ¶¶ 59-61 (asserting claim for "accounting" to ensure that RCR Fee revenues "inure to the benefit of consumers").

[120] *See, e.g., Hobson* Compl., ¶ 2 ("[T]he . . . fees imposed by Cingular *are not duly authorized by any governmental agency*. . . .") (emphasis supplied); *id.*, ¶ 4 (same); *Prieto* Compl., ¶¶ 1 & 30 (claiming fee is "unauthorized" and "unreasonable"); *Clinkscales* Compl., ¶¶ 51, 62-65 (claiming fee is "illegal" under state law because LNP "is not and may never be available"); *Bucy* Compl., ¶¶ 51, 62-65 (same); Wright Compl.,¶¶ 51, 62-65 (same); *Franczyk* Compl., ¶ 2 ("No governmental entity permits or mandates Cingular to impose the [RCR] fee on any of its consumers. . . ."); *id.*, ¶ 33 (same).

[121] *See, e.g., Hobson* Compl., ¶¶ 3, 8(a), 10, 43 & Prayer for Relief (complaining about Cingular's use of a separate line-item RCR charge and demanding an injunction that would prevent Cingular from billing subscribers in this manner); *Prieto* Compl., ¶¶ 2-3 & Prayer for Relief (same); *Clinkscales* Compl., ¶¶ 43, 51, 64, 68, 72 & Prayer for Relief (same); *Bucy* Compl., ¶¶ 43, 51, 64, 68, 72 & Prayer for Relief (same); *Wright* Compl., ¶¶ 43, 51, 64, 68, 72 & Prayer for Relief (same); *Franczyk* Compl., ¶¶ 1-2, 21-24 (complaining that use of line-item RCR Fee separate from other monthly rates is misleading).

Unfortunately, this potential was not realized. Judge Gaitan ordered briefing of the issue of whether removal of the complaints was proper, and his decision remanding the cases, which contains an entire section dedicated to "The Case for Federal Jurisdiction," vividly underscores the need for FCC action:

> [T]he Court finds that defendants make a compelling argument for retaining federal jurisdiction, in part due to the mandates which the FCC has recently required of wireless carriers. The FCC has used its authority over wireless carriers to require them to implement several initiatives including: enhanced 911 services, local number portability, number pooling and telecommunications relay services. Cingular notes that in order to ensure adequate funding and timely implementation of these costly initiatives, the FCC expressly authorized wireless carriers to recover their implementation costs from subscribers and left it to the carriers' discretion as to "whether, how, and how much of such costs they could choose to recover directly from the consumers through separately identifiable charges." Cingular also states that while the FCC did not mandate a standardized method for disclosing federal program cost recovery fees to customers, it endorsed the line-item method that Cingular employs.
>
> Another reason for retaining jurisdiction is to avoid inconsistent state court interpretations, further the government's goal of national uniformity and avoid immersing state courts in areas which are more suitable for federal jurisdiction. The manner in which defendants have characterized the charges on their bills should not control where these cases are heard. *Federal oversight efforts by the FCC or at the district court level would guarantee a judicially efficient disposition of these complaints without the potential for inconsistent results to the litigants.* Further, federal jurisdiction would also reduce judicial costs and maximize any value gained from this litigation to those who have suffered a loss. However, this jurisdiction should be grounded in complete preemption and clearly stated in the FCA. This would eliminate any confusion and need to rely on the artful pleading or substantial federal question doctrines.
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> Having said what the law ought to be, it is clear that the law as currently written and interpreted does not support federal jurisdiction. The clear majority of cases hold to the contrary. As much as the

> Court would like to change this trend, it cannot legislate from the bench.[122]

Since the question before him was whether Section 332(c)(3)(A)'s preemption of state law was so complete that it created federal removal jurisdiction, Judge Gaitan felt constrained to remand the cases to the state courts where they were initially filed. The Commission has now rendered its authoritative interpretation that Section 332 bars states from prohibiting CMRS providers' use of line items, because such regulation constitutes regulation of the CMRS rate structure, and thus CMRS rates.

That is not the end of the matter. States have laws of general applicability, which may be valid exercises of police power. However, certain state laws affecting CMRS providers' practices have been, and likely will continue to be, employed in back-door attempts to regulate CMRS providers' rates and entry. The Commission should clarify that it interprets Section 332's preemption of state CMRS rate and entry regulation as extending to all such regulation of CMRS rates and entry.

To the extent CMRS billing practices relate to rates, they should be governed exclusively by FCC policies, rather than the laws of the various states, as interpreted and applied by judges of general jurisdiction and lay juries. As the Commission has observed in a related context,

> since *the* courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs. This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c).[123]

Therefore, the FCC should make clear that where, as in the regulatory cost recovery fee cases, any application of state law that would invalidate, modify, or condition the use of particular dis-

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[122] *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp. 2d 838, 842-843 (W.D. Mo., 2004) (emphasis added) (citations omitted).

[123] *Wireless Forbearance Order*, 13 F.C.C.R. at 16872 ¶ 30.

closures, descriptions, line items, charges or other aspects of CMRS rate structures constitutes rate regulation that is preempted by Section 332(c)(3)(A).

Moreover, since "the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by a state trial court based on the specific claims before it,"[124] the Commission should provide guidance to courts and other tribunals in evaluating such claims. In *Bastien v. AT&T Wireless Services, Inc.*, a decision cited with approval in the *Wireless Consumers Alliance* order, the Seventh Circuit provided a model analysis of a complaint that, while pleaded in terms of state-law nondisclosure, consumer fraud, and contractual claims, in fact sought regulation of CMRS rates and entry. The *Bastien* court held that in considering whether a plaintiff's complaint, "however denominated, actually challenges [a CMRS provider's] rates," a court should consider "what the nature of the claims are and what the effect of granting the relief requested would be."[125] The court found that despite the state-law labels, the essence of Bastien's claims was the CMRS provider's failure to exceed FCC buildout requirements. This finding was bolstered by the plaintiff's "transparent attempt to recast federal claims as state law fraud and breach of contract actions" was exposed as such by the "complete absence of any details" in the complaint regarding the "particular promises or representations" made by the defendant wireless carrier.[126]

The FCC should once again endorse the *Bastien* analysis and urge courts and other tribunals considering whether Section 332(c)(3)(A) preempts a particular application of state law to focus on the nature of the claims and the effect of granting the relief requested. Where that ef-

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124 *Wireless Consumers Alliance*, 15 F.C.C.R. at 17036 ¶ 28.

125 *Bastien*, 205 F.3d at 987, 989.

126 *Bastien*, 205 F.3d at 989.

fect would be to regulate the rates or rate structure of CMRS providers, the application of the state law at issue is preempted by Section 332(c)(3)(A).

IV. DEFINITION OF "MANDATED CHARGES" FOR WIRELESS CARRIERS

The *Second Further Notice* seeks comment on a variety of issues related to carriers' marketing and billing practices, including definitions for certain line item charges and point of sale disclosures regarding the charges associated with carriers' service offerings. A number of the FCC's proposals, including those regarding the appropriate definition of "mandated charges" and point-of-sale disclosures, pertain to issues that are addressed in the AVCs to which three of the largest wireless service providers are parties. Cingular respectfully submits that, to the extent additional rules are necessary and the proposals contained in the *Second Further Notice* pertain to matters already resolved by the AVCs, the Commission should adopt rules or safe harbors (as discussed below) applicable to wireless carriers which are consistent with the AVCs. This approach serves the public interest. The vast majority of wireless subscribers already are enjoying the benefits of the commitments contained in the AVCs; a change in the practices addressed by the AVCs may cause confusion among those consumers. Adopting rules and safe harbors that are consistent with the AVCs also fosters the federal deregulatory approach the Commission has taken with respect to wireless carrier rates and billing practices. In addition, consistency with the terms of the AVCs will maintain the balance that was struck with Attorneys General of 33 states with respect to the enforcement of their consumer protection laws in the wireless context.

Cingular supports the Commission's proposal to adopt a uniform, national definition for mandated charges for wireless carriers. A clear, unambiguous definition for this term will advance one of the principal goals of the TIB policies and rules: to provide consumers with clear, non-misleading information so that they may meaningfully evaluate competing carriers' offers. Three of the largest nationwide wireless carriers are parties to AVCs that distinguish between charges that those wireless carriers are *required* to collect from consumers versus those which are discretionary. Cingular supports a definition of mandated charges to apply in the wireless context that is consistent with these existing obligations and billing practices.

A. The Definition of Mandated Charges Applicable to Wireless Carriers Should Be Limited to Charges that Wireless Carriers are Required to Collect and Remit to the Government or Authorized Agencies

The Commission should adopt the first of the two proposals set forth in the *Second Further Notice* with respect to charges assessed by wireless carriers. In this context, mandated charges should be defined as those "amounts that a [wireless] carrier is required to collect directly from customers, and remit to federal, state or local governments."[127] Under this definition, mandatory charges would include federal and state excise taxes, state and local sales taxes, and other levies on consumers of CMRS services (*e.g.*, some states' E911 fees) that a carrier is required to collect from its customers, but would not include charges relating to LNP, number pooling, CALEA, TTY, federal regulatory fees, state TRS programs, federal and state USF programs, and gross receipts taxes.

1. This Approach is Consistent with Commission Precedent

This approach is the more restrictive of the two proposed by the Commission, and is most consistent with the Commission's prior statements regarding the proper characterization of charges. This approach comports with FCC statements in the context of carriers' recovery of costs associated with federal USF and LNP programs,[128] and FCC interpretations of its own TIB rules.[129]

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127 *Second Further Notice* ¶ 40.

128 *TIB Order,* 14 F.C.C.R. at 7527-28 ¶ 56; *Fed.-State Joint Bd. on Universal Svc.*, 12 F.C.C.R. 8776, 9210-11 ¶ 853 (1997).

129 *TIB Order,* 14 F.C.C.R. at 7527-28 ¶ 56; *Second Further Notice* ¶ 27.

This approach also is in line with Commission precedent permitting wireless carriers to recover from customers the costs associated with regulatory programs as non-mandated fees if they choose. The *Second Further Notice* reiterates that wireless carriers may continue to recover "administrative fees and other purely discretionary charges."[130] Cingular supports wireless carriers' continued ability to recover the costs associated with government programs as they choose. Such flexibility is required by the First Amendment, and is consistent with the federal, deregulatory approach that has been applied to wireless carriers due to the competitive nature of the wireless mobile industry.

2. This Approach Also is Consistent with AVCs That Address State Consumer Protection Laws

This approach also is consistent with the AVCs to which Cingular, Verizon Wireless, Sprint PCS, and 33 state Attorneys General are parties. The Cingular AVC requires that Cingular:

> [S]eparate (i) taxes, fees, and other charges that Carrier is required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs, from (ii) monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges (including, but not limited to, Universal Service Fund fees), except when such taxes, fees, and other charges are bundled in a single rate with the monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges…[131]

Just as the Commission's first proposed definition of mandated charges does, the AVCs distinguish between charges that the wireless carrier signatories to the AVCs are *required* to collect from consumers and remit to the government, and charges that they *choose* to collect from consumers.

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130 *Second Further Notice*, ¶ 40.

131 Cingular AVC, ¶ 36.

The AVC was negotiated and ultimately signed by Attorneys General of 33 states in their capacity as prosecutors of their respective state statutes and regulations related to consumer billing practices, unfair trade practices, consumer fraud, and fair dealing in the context of wireless carrier service offerings. This provision in the AVC reflects that these Attorneys General viewed this distinction in charges as consistent with the principles underlying their respective consumer-protection statutes. The Commission should adopt the definition of mandated charges for wireless carriers that already has proven to be acceptable under state consumer protection laws.

B. The Definition of Mandated Charges Should Apply Nationally

The definition that the Commission adopts for mandated charges for wireless carriers should be applied on a national basis. National application of this term is imperative to avoid a patchwork of varying state-specific definitions which would increase confusion among customers regarding which charges wireless carriers are required to collect from consumers versus those which they have the discretion to pass along. Further, since many of the programs for which carriers are recovering costs from consumers are federal regulatory programs,[132] the FCC has an interest in ensuring that carriers do not misinform consumers regarding which of those costs the government has required to be passed on . Finally, national application of this defined term is consistent with Congress's intent that wireless carriers be subject to consistent regulation at the federal level.[133]

C. The Commission Must be Careful Not to Limit Carriers' Ability to Recover the Costs Associated with Regulatory Compliance Efforts

The Commission has ruled that carriers may recover the costs associated with their regulatory compliance efforts. With respect to local number portability, for example, the Commis-

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132 *E.g.*, local number portability, number pooling, CALEA, TRS, and federal USF and E911 programs.

133 *See* H.R. Rep. No. 103-213, at 490 (1993); *see also* U.S. Const., art. I, § 8, *supra*.

sion has indicated that carriers may recover the shared and carrier-specific costs directly related to the program, even though only a portion of the funds carriers recover may be remitted to the government or its designated agency.[134] There appears to be an inconsistency in the *Second Further Notice* with this prior FCC ruling regarding the amount of costs related to compliance that carriers may recover in discretionary charges associated with government programs. The Commission first indicates that carriers may recover authorized fees and administrative and other costs, provided that the manner in which they do so complies with the Commission's rules.[135] It then provides contradictory instructions — on the one hand stating that carriers must demonstrate that their discretionary line item charges for particular government programs do not exceed the maximum cap or fee *remitted to the government or agency* for such programs (which would appear to limit carriers to recovering only those amounts remitted to the government, as opposed to other compliance-related costs),[136] while on the other hand indicating that costs recovered through discretionary charges must be "*directly related to the specific underlying governmental program* or action" (which would appear to permit carriers to recover their compliance-related costs).[137]

In order to avoid any confusion arising out of these statements, the Commission should clarify that where carriers use line items to recover the costs associated with one or more regulatory program, if the FCC has issued guidance regarding the recovery of costs of regulatory programs where a fee is remitted to the government or its authorized agency, or has issued guidance regarding the recovery of costs of regulatory programs where no fee is remitted to the govern-

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[134] *Telephone Number Portability,* Third Report and Order, 13 F.C.C.R. 11701, 11720 ¶ 29 (1998);

[135] *Second Further Notice*, ¶ 26.

[136] *See, e.g., Second Further Notice*, ¶¶ 28-29.

[137] *Second Further Notice*, n. 119 (emphasis added).

ment or its authorized agency,[138] carriers must abide by such guidance regarding the amounts collected. If the FCC has not issued guidance with respect to a particular regulatory program that is included in a line item, carriers should follow the general principle in the *TIB Order*[139] that the charges should relate to the costs associated with the particular regulatory program. Further, carriers also may include separate line items on their bills for other administrative costs and expenses associated with compliance with government programs, to the extent not already recovered by program-specific line items on a customer's bill. This clarification would make clear to carriers that the Commission is not changing its policy with respect to the recovery of costs associated with particular regulatory programs.

D. The Commission Must Afford Carriers Adequate Time to Implement the Proposed Definition of Mandated Charges

The Commission's proposed definition of mandated charges that is supported herein for application in the wireless context already has been implemented with respect to the vast number of wireless customers because the three largest wireless companies already have incorporated

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138 For example, the Commission has ruled that line items to recover USF costs may not exceed the relevant contribution factor established by the Commission. Carriers remit fees based on this contribution factor to the government or its authorized agency. Regarding portability, as noted above, the Commission permits carriers to recover shared and carrier-specific costs directly related to the program. *See*, *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review — Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, *Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990*, *Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size*, *Number Resource Optimization*, *Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24952, 24978, ¶¶ 49-51 (2002) ("*USF Contribution Order*"); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 F.C.C.R. 20850 (1999); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order on Reconsideration, 17 F.C.C.R. 14789 (2002).

139 *TIB Order*, 14 F.C.C.R. at 7509 ¶ 28.

these definitions into their billing systems. Cingular, Verizon Wireless and Sprint PCS are parties to AVCs that distinguish mandated charges from discretionary charges consistent with the distinction that Cingular supports here. Thus, the majority of wireless customers already are receiving bills that are consistent with this approach, even without taking into account other carriers who may already have implemented the same approach.

However, those carriers who have not yet adopted this definition into their billing practices and information brochures must be provided a sufficient period during which to make the necessary changes to their billing systems. As detailed in Section I.B, *infra.*, carriers must reprogram their billing systems, test those systems, rectify any glitches that are revealed, and train customer service and marketing representatives regarding the new billing practice. These functions are resource-intensive. Cingular submits that a minimum of a 12-month implementation period is necessary to enable wireless carriers to accomplish these tasks.

E. The FCC Should Require That Wireless Carriers Place Mandated Charges In A Separate Section Of Customer Bills

Cingular supports the Commission's tentative conclusion that mandated charges should be placed in a section of a wireless customer's bill that is separate from all other charges. This separation will foster the underlying goals of the TIB rules to "provide consumers with clear, well-organized, and non-misleading information so that they may be able to reap the advantages of competitive markets."[140] The separation of mandated charges from all others in wireless bills will reduce the possibility that consumers become confused regarding which charges carriers are required to collect directly from customers versus those which they choose to pass on. Cingular agrees with the Commission that this approach strikes a reasonable balance between the goals of the TIB rules to provide consumers with clear, non-misleading information, and the First

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[140] *TIB Order,* 14 F.C.C.R. at 7501 ¶ 14.

Amendment rights of wireless carriers to include discretionary charges related to government programs in other portions of customer bills, if they choose to do so.

This requirement is consistent with the AVCs to which Cingular, Verizon Wireless and Sprint PCS are parties.[141] Those AVCs require these wireless carriers to segregate mandated charges (those which they are *required* to collect from customers and remit to the government or authorized agencies) from other charges on their customer bills. The AVCs also provide that these carriers may not state or imply that discretionary cost recovery charges are taxes.

And, to the extent the Commission adopts the broader proposed definition of mandated charges, the practice of separately identifying mandated charges from all others is consistent with the CTIA Consumer Code, to which dozens of nationwide, regional, and smaller CMRS carriers already adhere.[142]

F. If the Commission Adopts a Broader Definition of Mandated Charges, it Should Adopt the Provisions of the AVCs as a Safe Harbor

The FCC's second proposed definition of mandated charges, which would include any fees that carriers collect and remit to the government or authorized agencies, is consistent with the CTIA Consumer Code. To the extent the Commission adopts that proposed definition for wireless carriers in light of the broad-based support of the CTIA Consumer Code, the Commission should adopt the AVCs' required distinction in charges as a safe harbor, and confirm that

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141 *See* Cingular AVC, ¶ 36 (requiring carriers to "[a] separate (i) taxes, fees, and other charges that Carrier is required to collect directly from Consumers and remit to federal, state, or local governments, or to third parties authorized by such governments, for the administration of government programs, from (ii) monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges (including, but not limited to, Universal Service Fund fees), except when such taxes, fees, and other charges are bundled in a single charge with the monthly charges for Wireless Service and/or Enhanced Features and all other discretionary charges; and [b] not represent, expressly or by implication, that discretionary cost recovery fees are taxes").

142 CTIA Consumer Code, Section Six (precluding carriers from labeling cost recovery fees or charges as taxes).

carriers who separate charges on the bill based on the more stringent AVCs will be deemed compliant with the FCC's rules. Since the AVC distinction is more restrictive, and would allow carriers to represent fewer charges as government-required assessments, safe harbor treatment is appropriate. The Commission also should clarify certain of its earlier rulings regarding the recovery of costs associated with certain programs like USF to make clear that those rulings are consistent with the broader definition of mandated charges.

V. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL CATEGORIES BEYOND "MANDATED" CHARGES

The differentiation of certain charges as mandated, and segregation of those charges into a separate section on wireless consumer bills strikes an appropriate balance between consumer protection interests and carriers' First Amendment rights. As discussed above, by adopting a definition of mandated charges for wireless carriers which includes only those charges that the government *requires* to be collected from customers, and then requiring that those charges be segregated from all others on customer bills so as to make clear to wireless customers which charges are required as opposed to discretionary, the Commission will have effectively addressed the concern that carrier line item charges related to government programs may mislead consumers. These requirements will enable wireless consumers to obtain information in terms most relevant to them — *i.e.*, which charges are required by the government (and therefore unavoidable) and which charges are being passed through by the wireless carrier of its own volition (and therefore relevant in the consideration of competing service provider packages). There is no record evidence that the adoption of *additional* categories of charges is necessary to make carrier bills clear and non-misleading. Indeed, the adoption of multiple categories may increase consumer confusion.[143]

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[143] *TIB Order*, 14 F.C.C.R at 7511-12 ¶¶ 31-32.

VI. CINGULAR SUPPORTS DISCLOSURE REQUIREMENTS CONSISTENT WITH THE AVC FOR WIRELESS CARRIERS

To the extent disclosure rules are necessary, Cingular supports the disclosure provisions agreed to and included in the AVCs. Cingular supports disclosure of information regarding the estimated total charges associated with wireless services, including an estimate of any discretionary line items and a reasonable estimate of government mandated surcharges, to subscribers at the point of sale. A fundamental goal underlying the TIB rules is the provision of clear, accurate, non-misleading information to consumers so that they may meaningfully compare competing service offerings when deciding which service to take. Requiring wireless carriers to provide information during the sales transaction that reveals the service charges, the fact that taxes, surcharges and other fees apply, and an estimated range of discretionary charges, is fundamental to achieving that goal.

Disclosure requirements in the AVCs are similar to requirements in the CTIA Consumer Code. The CTIA Consumer Code requires that carriers disclose at the point of sale, on their websites, and in all advertising to the extent practicable given the medium, *inter alia*, (i) "whether any additional taxes, fees or surcharges apply," and (ii) the amount or range of any such fees or surcharges that are collected and retained by the carrier."[144] The Cingular AVC requires carriers to disclose all material information to consumers during a sales transaction, including information about additional monthly charges associated with the wireless service.[145]

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[144] CTIA Consumer Code, Sections One and Five.

[145] Cingular AVC, ¶¶ 17-18 (requiring carrier to disclose "all material terms and conditions of the offer to be purchased" during a sales transaction, including "the fact that monthly taxes, surcharges, and other fees apply, including a listing of the name or type and amount (or, if applicable, a percentage formula as of a stated effective date) of any monthly discretionary charges that are generally assessed by Carrier on Consumers in a uniform dollar amount or percentage without regard to locale. For additional monthly discretionary charges that are assessed by carrier on Consumers with regard to locale, Carriers shall clearly and conspicuously disclose that additional monthly fees will apply, depending on the customer's locale, and disclose the full pos-

(footnote continued on next page)

Cingular disagrees with the statement in the *Second Further Notice* that a carrier's provision of a range of potential surcharges at the point of sale may be misleading because it may not effectively advise the consumer of the costs associated with service. The disclosure to a wireless consumer of the full range of potential charges associated with a particular service offering provides the consumer with the utmost in disclosure regarding the costs of service — the consumer can assess not only the lowest possible cost for service, but also (most importantly) the highest possible cost. As long as the range of potential charges provided is accurate and non-misleading, the use of ranges of wireless carrier charges is consistent with the TIB rules.

The use of a range of charges also is consistent with the AVCs. As discussed above, the AVCs require with respect to non-mandated charges that vary by locale that the wireless carrier signatories "disclose that additional monthly fees will apply, depending on the customer's locale, and disclose the full possible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges."[146] In other words, the Attorney General signatories to the AVCs believed that a carrier's disclosure of the highest possible charge out of a range of charges would satisfy the various consumer protection, deceptive practices and consumer fraud statutes and regulations that the AVCs were intended to address in the wireless context. Where a consumer is apprised of the highest potential charges associated with his or her telecommunications service, it cannot be said that the consumer was misled. Further, Commission precedent supports the right, at least of non-dominant carriers such as wireless providers, to utilize a range of rates when disclosing the rates associated with the service being provided. Specifically, Commission precedent permitted non-dominant carriers filing

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(footnote continued)

sible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges.")

[146] Cingular AVC, ¶¶ 17-18.

federal tariffs with respect to interstate and international services that contained ranges of rates as opposed to specific rates.[147] While the Commission order permitting the use of ranges of rates by such carriers ultimately was vacated, it was vacated on the grounds that ranges of rates did not satisfy the requirement contained in Section 203 of the Act to set out specific rates in tariffs.[148] It was *not* vacated on grounds that the use of a range of rates constituted an unreasonable charge or practice under Section 201(b).

VII. SURCHARGES IDENTIFIED AS "REGULATORY ASSESSMENT FEES" OR "COST RECOVERY CHARGES" COMPLY WITH THE REQUIREMENTS OF RULE SECTION 64.2401(b) AND SUCH COMBINED SURCHARGES ARE REASONABLE UNDER SECTION 201(b)

The use of "regulatory assessment fees" or "cost recovery charges" consistent with the rules and procedures applicable to other discretionary charges is consistent with Section 64.2401(b) of the Commission's Rules which requires carriers to provide clear, well-organized and non-misleading information to consumers.[149] As always, the determination of whether a particular carrier's use of such cost-recovery line items complies with this rule also depends upon the disclosures and any descriptions that may be associated with the particular line item.[150]

The Commission prohibits carriers from stating or implying that discretionary charges are mandated or that the carrier has no choice regarding whether to pass along the cost being recovered to the consumer. Assuming that the "regulatory assessment fee" or "cost recovery charge" line item is employed consistent with these requirements, the use of such line items would not be misleading under Commission precedent.[151]

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[147] *See Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order*, 8 F.C.C.R. 6752 (1993).

[148] *Southwestern Bell Corp. v. FCC*, 43 F. 3d 1515 (D.C. Cir. 1995).

[149] *Second Further Notice*, ¶ 47.

[150] *TIB Order*, 14 F.C.C.R. at 7527 ¶ 56.

[151] *See TIB Order*, 14 F.C.C.R. at 7527-28 ¶ 56.

Further, while the Commission has supported standardized labels for certain line items related to regulatory programs, the FCC has not adopted any such standardized labels. The Commission also has declined to impose standardized labeling requirements with respect to other costs associated with regulatory compliance, and other general administrative costs and expenses, opting instead to afford CMRS carriers a reduced federal regulatory framework pursuant to which they may recover such costs through the use of discretionary charges. Thus, it cannot be argued that the lack of a standard term among carriers renders these line items unclear under the Commission's rules.

Finally, the Commission also must look to specific carrier descriptions and disclosures related to the particular line item to determine whether the charge is sufficiently clear and non-misleading. Where a carrier discloses the purpose of a line item (provided the disclosure is accurate and non-misleading), segregates it from mandated charges and expressly advises consumers that the charge is not a tax or otherwise required by the government, that line item is clear and non-misleading in compliance with Section 64.2401(b).

The Commission also questioned in the *TIB Order* and in the *Second Further Notice* whether the combination of regulatory programs into a single cost recovery fee is consistent with the TIB rules. The FCC declined in the *TIB Order* to impose obligations on carriers in this regard, acknowledging that permitting carriers to combine programs into a single charge could enable carriers to bury costs in lump figures, but, on the other hand, a single charge could be more easily understandable by consumers because of its simplicity, and that extensive break-downs of carriers costs may actually "creat[e] confusion that outweighs the benefits of providing such descriptions."[152] In light of this conflicting record evidence, the Commission sought further com-

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[152] *TIB Order,* 14 F.C.C.R. at 7526-27, 7529 ¶¶ 55 and 58.

ment on the use of composite regulatory cost recovery fees. To date, however, the Commission has not adopted rules expressly addressing whether the combination of charges is permissible.

The Commission now seeks comment on whether such combination of charges is reasonable under Section 201(b) of the Act. Cingular respectfully submits that this practice is reasonable, provided that carriers comply with applicable Commission rules prohibiting carriers from stating or implying that discretionary charges are mandated or that the carrier has no choice regarding whether to pass along the cost to the consumer, and not including misleading statements in any associated descriptions they provide regarding the charge.[153] This is consistent with Commission precedent, finding unreasonable practices in cases where a carrier provides misleading information to consumers regarding charges or details regarding the service being provided.[154]

VIII. CMRS CARRIERS ARE NOT PROHIBITED FROM RECOVERING INTERSTATE TRS CONTRIBUTIONS THROUGH LINE ITEMS

In the *Declaratory Ruling*, the Commission ruled that "carriers are not prohibited *per se* . . . from including non-misleading line items on telephone bills."[155] The Commission emphasized, however, that this finding did not alter or eliminate any existing "prohibition or restriction on the use of line items" such as its prohibition against line items for interstate Telephone Relay Service ("TRS") costs.[156] Later in the *Declaratory Ruling*, the Commission stated that its deci-

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[153] Cingular also is abiding by the AVC requirements by segregating discretionary cost recovery charges from mandated charges in its customers' bills, as well as disclosing information about its rates and surcharges at the point of sale.

[154] *See, e.g., Himmelman v. MCI Communications Corp.*, 17 F.C.C.R. 5504 (2002); *Capital Network Systems, Inc.*, 7 F.C.C.R. 8092 (1992).

[155] *Declaratory Ruling* at ¶ 23.

[156] *Id.* at n.64 citing *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, 6 F.C.C.R. 4657, 4664 ¶ 34 (1991) ("*1991 TRS Order*"), *Order on Reconsideration,* 8 F.C.C.R. 1802, 1806 ¶ 22 (1993) ("*TRS Recon*"); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with*

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sion to preempt states from prohibiting carriers from using line items "may be in tension with our prior conclusion . . . that carriers may not recover interstate TRS costs as a specifically identified line item." Although the Commission has pledged to "revisit this TRS-related prohibition in a future proceeding in a separate docket,"[157] Cingular submits that the Commission can and should resolve this issue now.

A careful analysis of the Americans with Disabilities Act ("ADA") and the Commission's TRS orders reveals that the TRS line item prohibition was intended to apply only to carriers who are subject to jurisdictional cost separations. The Commission, therefore, should clarify now that wireless carriers are not barred from recovering TRS contributions through a line item instead of deferring this issue to a future proceeding.

There is no prohibition against recovering interstate TRS contributions through line items codified anywhere in the Commission's rules. Rather, to the extent that any such ban exists with respect to certain carriers, it was established in the Commission's orders implementing the provisions of the ADA to establish the interstate TRS fund.[158] A review of the ADA and these orders, however, reveals that, while CMRS carriers are included in the definition of "carriers" that are required to pay TRS contributions,[159] neither the ADA nor those orders expressly prohibit wireless carriers from recovering their contributions through a line item.

First, the ADA requires "each common carrier providing telephone voice transmission services" to provide TRS. Section 225(d)(3) of the ADA "mandates that the Commission pre-

(footnote continued)

Hearing and Speech Disabilities, 19 F.C.C.R. 12224, 12228 n.33 (2004) ("*2004 TRS Report and Order*").

157 *Id.* at n.86.

158 *See supra* text at n. 158.

159 *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, 9 FCC Rcd 1637 ¶ 2 (1993).

scribe regulations governing the jurisdictional separations of costs for TRS."[160] CMRS carriers, however, have never been subject to jurisdictional cost separations; thus, this provision would not apply to CMRS carriers.

Second, in proposed rules to implement this statutory provision, the Commission tentatively decided that "where appropriate, costs of providing TRS shall be separated in accordance with the" Commission's jurisdictional separation procedures and standards.[161] Thus, insofar as CMRS carriers are not subject to jurisdictional separations, application of the rule would not have been appropriate for CMRS carriers. The Commission ultimately did not adopt this proposal, on the grounds that there was insufficient record evidence to determine a specific TRS funding mechanism.[162]

Regarding TRS cost recovery by carriers, the Commission stated:

> [i]t is unclear from the record how TRS ultimately will be provided by various carriers, what state programs will seek certification, what the costs of TRS will be and how these costs could best be recovered. In order to achieve the goals of the ADA without unnecessarily disrupting TRS as currently provided, . . . ***current separations rules are adequate***. Moreover, in order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs ***as part of the cost of interstate telephone service***, not as a specifically identified charge on subscribers' lines.[163]

This language clearly suggests that, with regard to TRS cost recovery, the Commission adhered to the ADA's mandate that "costs caused by interstate TRS shall be recovered from all subscribers for every interstate service and costs caused by intrastate TRS shall be recovered from the

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160 *1991 TRS Order*, 6 F.C.C.R. at 4663 ¶ 31.

161 *Id.*(emphasis added).

162 *Id.*, 6 F.C.C.R. at 4664 ¶ 34.

163 *Id.*(emphasis added).

intrastate jurisdiction."[164] Thus, the rule ultimately adopted did not apply to CMRS carriers not subject to jurisdictional cost separations.

Third, subsequent Commission TRS-related decisions do nothing to explain how or why carriers not subject to rate regulation or jurisdictional separations should be prohibited from recovering interstate TRS costs through a line item. For example, in a petition for reconsideration of the *1991 TRS Order,* GTE argued that the TRS line item prohibition "does not apply to domestic satellite operators, as they do not operate under existing separations rules."[165] The Commission, however, did not reach this point in its order on reconsideration. In fact, the Commission's *TRS Recon Order* mentioned the line item issue only in passing. The Commission rejected a proposal by MCI for establishing a joint-funding mechanism for TRS, asserting that such a mechanism was infeasible:

> because carriers are required to recover interstate TRS costs as part of the cost of interstate telephone service and not as a specifically identified charge on end user's lines.[166]

In the *TRS Third Report and Order,* the Commission finally adopted a specific TRS funding mechanism, but again did not address the question of whether CMRS carriers should be barred from recovering TRS contributions through a line item. In rejecting arguments that the Commission should recover TRS costs directly from subscribers in a manner similar to the subscriber line charge, however,[167] the Commission did recognize that Congress had:

> contemplated that the FCC might recover the cost for the interstate telecommunications relay service through the imposition of a fixed

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[164] *Id.* at 4663 ¶ 31.

[165] Petition for Reconsideration of GTE Service Corp., CC Docket No. 90-571, filed September 3, 1991, pp. 3-4.

[166] *TRS Recon Order,* 8 F.C.C.R. at 1806 ¶ 22.

[167] *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Third Report and Order,* 8 F.C.C.R. 5300, 5302, ¶ 12 (1993) ("*TRS Third Report and Order*").

> monthly charge on residential customers, similar to the subscriber line charges assessed on subscribers to local telephone service under Part 69 of the FCC's rules, even though doing so would not seem to capture 'all subscribers to every interstate service.'[168]

Nevertheless, the Commission chose to require carriers to contribute to TRS funding, rather than recovering costs directly from the subscribers. While the Commission did not address how carriers may recover their contributions from customers, it did reiterate that its "existing accounting and separations rules" are adequate for TRS purposes.[169] Again, the existing separations rules referenced by the Commission did not cover CMRS carriers.

Notably, in a TRS-related proceeding in 2000, the Commission concluded that wireless carriers are entitled to recover the costs of providing access to TRS through 711 "in any lawful manner that is consistent with their obligations under 47 U.S.C. § 225(d)(1)(D) and 47 C.F.R. § 64.604(c)(4),"[170] specifically because wireless carriers are not rate regulated or subject to the separations rules.

> Implementation costs associated with providing access to TRS through 711 must be borne by all common carriers as an obligation under section 225(b)(1) of the Act. . . . Wireline carriers may properly include the costs they incur in implementing 711 access to TRS with their joint and common costs and recover those costs from the rates charged for intrastate and interstate services, separated pursuant to the Commission's jurisdictional separation rules. *Wireless carriers, which are neither subject to economic rate regulation nor to the jurisdictional separations rules, may recover their costs of providing access to TRS through 711 in any lawful manner* . . . .[171]

Finally, the *2004 TRS Report and Order* does nothing with regard to the line item issue other than repeat the Commission's language from the *1991 TRS Order*.

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168 *Id.*

169 *Id.*, 8 F.C.C.R. at 5305 ¶ 30.

170 *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 15 F.C.C.R. 15188, 15209 ¶ 44 (2000).

171 *Id.* (emphasis supplied).

> [C]arriers obligated to contribute to the Interstate TRS Fund (e.g., carriers providing interstate telecommunications services) may not specifically identify a charge on their consumers' bill as one for relay services.[172]

In essence then, nothing in the Commission's TRS rules or precedent compels the conclusion that CMRS carriers are prohibited from recovering interstate TRS contributions through line items on customer bills. In fact, the Commission's orders clearly reflect its intent to relate TRS cost recovery to the application of the jurisdictional separations rules in the TRS context. CMRS carriers, however, have never been subject to rate regulation or jurisdictional separations and it is thus reasonable to conclude that Commission's directive regarding TRS cost recovery in the *1991 TRS Order* was not intended to cover CMRS carriers.

This conclusion is supported by long-standing Commission precedent holding that carriers that are not rate regulated or subject to jurisdictional separations should be permitted to recover their costs for complying with various government mandates in any lawful manner. For example, as noted above, the Commission found that wireless carriers "may recover their costs of providing access to TRS through 711 in any lawful manner" precisely because they were not rate regulated or subject to jurisdictional separations.[173] The Commission also found that:

> Carriers not subject to rate regulation -- such as competitive LECs, CMRS providers, and non-dominant IXCs -- may recover their carrier-specific costs directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act.[174]

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172 *2004 TRS Report and Order*, 19 F.C.C.R. at 12228, n.33.

173 *Use of N11 Codes and Other Abbreviated Dialing Arrangements,* 15 F.C.C.R. at 15209 ¶ 44.

174 *Telephone Number Portability*, Third Report and Order, 13 F.C.C.R. 11701, 11774 ¶ 136 (1998); *see also Telephone Number Portability*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 F.C.C.R. 2578, 2580, ¶ 2 (2002) (affirming that carriers not subject to rate-of-return regulation or price caps may recover their carrier-specific LNP costs in any lawful manner consistent with their obligations under the Communications Act).

The Commission made the identical finding regarding carriers' recovery of costs associated with implementing thousands-block number pooling.

> Carriers not subject to rate regulation, such as competitive LECs (CLECs) and CMRS providers, may recover their carrier-specific costs directly related to implementation of thousands-block number pooling in any lawful manner consistent with their obligations under the Communications Act of 1934, as amended (the Act).[175]

These cases support the general proposition that because they are not rate regulated or subject to jurisdictional separations, CMRS carriers are entitled to recover TRS contribution costs in any lawful manner. As detailed above, CMRS is typically offered as an integrated interstate and intrastate package and billed on a unitary basis in which monthly and per-unit charges cover interstate and intrastate services without distinction. In other words, the rates and billing practices of carriers are not separable into interstate and intrastate components. Moreover, CMRS carriers have never been subject to rate-of-return regulation or the jurisdictional separations rules.[176] Thus, imposing such a ban on CMRS carriers with regard to interstate TRS contributions would run counter to long-standing Commission precedent finding that carriers not subject to rate regulation or jurisdictional separations may recover their costs in any lawful manner.

Furthermore, insofar as CMRS carriers have never been subject to rate-of-return regulation or the jurisdictional separations rules, imposing the TRS line item ban on CMRS carriers would simply not serve the Commission's stated purpose for the ban, *i.e.*, ensuring that interstate

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175 *Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Telephone Number Portability*, 17 F.C.C.R. 252, 255 ¶ 3 (2001).

176 *See, e.g., The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling,* 2 F.C.C.R. 2910 ¶ 18 (1987) ("Although we are not mandating a jurisdictional separations process for the cellular service unless it becomes necessary to do so . . . .").

TRS contributions were recovered only through interstate rates. As a consequence, there is simply no logical basis to conclude that the TRS line item prohibition was in fact intended to apply and should be applied now to CMRS carriers. The Commission should therefore clarify that the TRS line-item prohibition does not apply to CMRS.

CONCLUSION

For the foregoing reasons, Cingular respectfully requests that the Commission adopt the recommendations set forth herein.

Respectfully submitted,

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June 24 , 2005